No. 971364 FEB 19 1998
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In The
Supreme Court of the United States
October Term, 1997

ROBERT S. SPRINGSTON
Petitioner,

v.

CONSOLIDATED RAIL CORPORATION, et al.;
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTION PRESENTED FOR REVIEW

Whether the district court and court of appeals erred as a matter of law in holding that Plaintiff's state law tort claims for lack of locomotive conspicuity devices were preempted by federal law.

LIST OF PARTIES TO PROCEEDINGS

IN THE COURT BELOW

The following persons and entities were parties before the United States Court of Appeals for the Sixth Circuit: Petitioner Robert Springston, Respondent Consolidated Rail Corporation, and Respondent General Motors Corporation.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears in the appendix to this petition (App. A) and has been reported at 130 F.3d 241 (6th Cir. 1997).

Also in the appendix are the Order of the United States Court of Appeals for the Sixth Circuit denying Springston's Petition for Rehearing en banc, and the Opinion of the District Court for the Northern District of Ohio (David D. Dowd, Jr., D.J.) granting Respondents' motions for summary judgment on the issue of whether federal law preempted Petitioner's state law tort claims regarding locomotive conspicuity devices (App. C). Judge Dowd's Opinion has been reported at 863 F.Supp. 535 (N.D. Ohio 1994).

STATEMENT OF JURISDICTION

On November 19, 1997, the United States Court of Appeals for the Sixth Circuit entered judgment affirming the decision of the United States District Court for the Northern District of Ohio. The Sixth Circuit held that Petitioner's state law tort claims against Respondents regarding locomotive conspicuity devices were preempted by federal law. The jurisdiction of this Court is

invoked pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

This case involves the application of several provisions of the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. §§ 421, 431(u) and 434 (1992) (repealed), and several provisions of its successor, the Federal Railroad Safety Authorization Act, 49 U.S.C. §§ 20101, 20102, 20106, and 20143 (1994). This case also involves the application of several provisions of the Locomotive Boiler Inspection Act ("LBIA"), 45 U.S.C. §§ 22 and 23 (1924) (repealed), and several provisions of its successor, the Federal Safety Appliance Act, 49 U.S.C. §§ 20301 and 20302. The relevant portions of these Acts appear in the appendix to this petition (App. E).

STATEMENT OF THE CASE

This matter arises out of a railroad crossing collision that occurred on June 2, 1991 in Wood County, Ohio, between a

motorist, Petitioner Robert Springston (hereinafter "Springston"), and a locomotive owned and operated by Respondent Consolidated Rail Corporation (hereafter "Conrail"). Mr. Springston was a resident of Illinois. Conrail is a Pennsylvania corporation. Respondent General Motors Corporation (hereafter "GM"), the manufacturer of the locomotive, is a Delaware corporation. As a result of this collision, Mr. Springston was ejected from his vehicle. He is now a quadriplegic.

The crossing in issue was located in a dark, rural setting, and was not protected with active warning devices such as automatic gates and flashing lights. Springston had never been to this crossing before. Therefore, given the absence of automatic gates and flashing lights, it was imperative that this locomotive be equipped with warning devices and safety equipment to make it more conspicuous and discernible to a nighttime

motorist. Unfortunately, this locomotive did not have ditch lights -- twin, high intensity auxiliary lights mounted horizontally on the front of the locomotive base. Ditch lights combined with the headlight create a unique, unmistakable lighting formation which alerts a nighttime motorist that a train is approaching. These devices have been known in the railroad industry for decades.

The locomotive also lacked oscillating lights and strobe lights. An oscillating light is a white light on the front of the locomotive that revolves in a figure eight rotation. Strobe lights perform differently. Strobe lights are mounted on the front of the locomotive and flash high intensity warning signals to nighttime motorists. Had ditch lights, oscillating lights or strobe lights, or any combination thereof been used, the locomotive would have been more discernible and conspicuous to Bob Springston. This

entire tragedy could have been prevented had the locomotive been so equipped.

Mr. Springston filed his diversity action on January 14, 1993 in the United States District Court, Northern District of Ohio. Springston alleged several claims of negligence against Conrail, and alleged product liability claims against GM. On April 1, 1994, both Conrail and GM moved for partial summary judgment on Springston's state law tort claims regarding conspicuity devices, arguing that federal law preempted his claims. On July 5, 1994, the district court granted partial summary judgment for both Conrail and GM, holding that Springston's claims for lack of locomotive conspicuity devices were preempted by federal law. (App. C) The district court held that "it is within the scope of the Secretary of Transportation's authority to prescribe reflective materials or strobe, ditch or oscillating lights for locomotives, and any

state regulation is therefore preempted." (App. C) Furthermore, although the district court acknowledged in a footnote that the LBIA was "clearly enacted for the primary purpose of protecting railroad workers," the court concluded that the preemptive reach of the LBIA encompassed conspicuity devices designed to protect motorists approaching railroad grade crossings. (App. C) Accordingly, the district court held that Springston's state law tort claims were preempted by federal law.

This ruling left Conrail as the sole defendant for trial, and that trial resulted in a defense verdict. Prior to trial, the District Judge, David Katz, issued an opinion granting Conrail's Motion in Limine to bar any evidence concerning the lack of conspicuity devices on the locomotive. (App. D) Judge Katz's opinion was based upon the same preemption grounds articulated in Judge

Dowd's earlier opinion awarding partial summary judgment.

On appeal, the Sixth Circuit affirmed the award of summary judgment, holding that Springston's claims for lack of locomotive conspicuity devices were preempted. The court reasoned that the FRSA did not affect or modify the preemptive effect of the LBIA on state regulation of locomotive equipment. (App. A) Citing only to Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983), the Sixth Circuit concluded that the FRSA did not subsume, replace, or recodify any acts. (App. A)

REASONS FOR GRANTING THE WRIT

The Sixth Circuit has decided an important question of federal law in a way that conflicts with decisions by a state court of last resort, thus implicating Sup. Ct. R. 10(1)(a)-(c). As will be shown, the Sixth Circuit's decision in this case stands in direct conflict with two decisions of the

Supreme Court of Montana, which unambiguously hold that state law tort claims for lack of locomotive conspicuity devices are not preempted by federal law. Specifically, the Sixth Circuit's decision in this case conflicts with Runkle v. Burlington Northern R.R. Co., 188 Mont. 286, 613 P.2d 982 (Mont. 1980), and Henry v. District Court of the Seventeenth Judicial District (1982), 198 Mont. 8, 645 P.2d 1350. The Sixth Circuit's decision is also inconsistent with the history and purpose of the LBIA and the FRSA.

The precise conflict between the Sixth Circuit's decision and the Supreme Court of Montana's decisions is whether the LBIA and the FRSA preempt a plaintiff's state law tort claims for failing to equip a locomotive with conspicuity devices such as ditch lights, oscillating, lights or strobe lights, as well as other reflective devices to make its locomotive more conspicuous to nighttime

motorists approaching railroad grade crossings.

This Court has always maintained a strong presumption against preemption. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 662 (1993); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). This view was fashioned in part by the Court's consistent refusal to preempt matters of health and safety which have historically been left to the states. County of Hillsborough v. Automated Medical Labs, 471 U.S. 707, 719 (1985). The presumption against preemption is even stronger where the federal law preempts state tort law and provides no federal remedy. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 257 (1984).

Protecting innocent victims from defective products, and providing compensation to those who are injured by defective products, is traditionally a strong state interest. This Court has admonished

courts to presume that Congress does not intend to preempt traditional areas of state regulation. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985). See also, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

Adhering to this Court's precedent, the Supreme Court of Montana has expressly rejected the argument that a claim for lack of locomotive conspicuity devices is preempted by federal law. In Runkle v. Burlington Northern R.R. Co., 188 Mont. 286, 613 P.2d 982 (Mont. 1980), a nighttime motorist was killed when his pickup truck was struck by a locomotive at a grade crossing that was not protected by automatic gates and flashing lights. The locomotive was not equipped with any conspicuity devices to aid the motorist in discerning it. The Supreme Court of Montana specifically stated that whether the locomotive should have been

equipped with conspicuity devices was a question of fact for the jury:

> Thus it may not be enough for the railroad to protect its crossing with a standard crossbuck, to operate a train within a speed limit or to blow the whistle and ring the bell. The jury is still permitted to determine whether the railroad exercised reasonable care and caution under the circumstances and conditions existing at the time of the accident. Whether a railroad is negligent in a particular manner, such as in failing to provide automatic crossing gates, oscillating headlights, flasher lights, or in failing to reduce its speed is a question of fact for the jury. Id, 188 Mont. at 300, 613 P.2d at 991, citing DeElena v. Southern Pac. Co., (1979), 121 Ariz. 563, 592 P.2d 759, 762; Seaboard Coast Line R. Co. v. Buchman, (Fla. App. 1978) 358 So.2d 836, 839-40.

Two years later, the Supreme Court of Montana reaffirmed the Runkle decision in the case of Henry v. District Court of the Seventeenth Judicial District (1982), 198

Mont. 8, 645 P.2d 1350, appeal dsm'd. on other grounds, 457 U.S. 1101. In Henry, a nighttime motorist was killed at a grade crossing when her vehicle was struck by a locomotive which was not equipped with conspicuity devices. Henry, 198 Mont. at 9, 645 P.2d at 1350. The trial court dismissed plaintiff's state law tort claims for lack of conspicuity devices, holding that such were preempted by the FRSA and LBIA. Id. at 9-10, 645 P.2d at 1351. An immediate appeal to the Supreme Court of Montana ensued. The Montana Supreme Court phrased the issue as follows:

> Whether federal legislation has preempted the state from imposing a common law duty on railroad carriers to have additional warning devices mounted on their locomotives? Id.

In reversing the trial court, the Montana Supreme Court specifically rejected the argument that the LBIA and FRSA preempted all state law tort claims for lack of conspicuity devices. Id. at 12-13, 645 P.2d

at 1352. The court held that claims concerning conspicuity devices go to warning issues, not the illumination issues addressed in the FRSA and LBIA. Accordingly, the court concluded "we hold Congress has preempted the area of illumination devices but not warning devices." Id. at 13, 645 P.2d at 1352.

The Sixth Circuit's decision in this case cannot be reconciled with Runkle and Henry. In this case, the Sixth Circuit simply held that claims concerning locomotive conspicuity devices were preempted. The Sixth Circuit concluded that Congress intended to occupy the entire field of locomotive devices when it enacted the LBIA. The Sixth Circuit added that the FRSA did not affect or modify the preemptive reach of the LBIA, even though it was the first congressional legislation to specifically mention ditch lights, strobe lights or oscillating lights. (App. A) The Sixth Circuit concluded summarily "federal law

preempts plaintiff's claims based upon the need for extra-statutory warning devices on the train."

Not only is the Sixth Circuit's decision in conflict with Runkle and Henry, it is also inconsistent with the history and purpose of the LBIA and the FRSA. First, by express definition, the LBIA was enacted for the purpose of protecting railroad employees, not motorists like Springston. In 45 U.S.C. § 22 (1924), Congress specifically limited the coverage of the LBIA to "employees", defined as "persons actually engaged in or connected with the movement of any train." (App. E.) The LBIA was repealed on July 5, 1994, more than three years after Springston's collision. Its successor, the Federal Safety Appliance Act, does not in any way broaden the class of protected persons beyond railroad employees. 49 U.S.C. §§ 20301 and 20302 (App. E)

Therefore, Springston's state law tort claims would not be preempted unless Congress had passed legislation specifically covering the subject of locomotive conspicuity devices like ditch lights, oscillating lights, strobe lights or other reflective devices. The FRSA was the first Congressional Act to address railroad safety with an eye towards protecting motorists approaching railroad grade crossings. When first enacted in 1970, Congress specifically authorized the States to "adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434 (App. E) Conspicuity devices were not even mentioned in the FRSA until 1992, one year after Springston's collision, when Congress amplified § 431 of the FRSA. On that basis alone, Springston's claims are not

preempted. Even when § 431 was expanded in 1992, Congress merely directed the Secretary of Transportation to issue interim regulations addressing ditch lights, etc. "not later than December 31, 1992". 45 U.S.C. § 431(u)(2) (App. E) Final regulations on locomotive conspicuity measures would not be required by the Secretary until "June 30, 1994", more than three years after Springston's collision. 45 U.S.C. § 431(u)(3) (App. E) Obviously, since interim and final regulations on the locomotive conspicuity devices would not be issued until years after Springston's collision, the Secretary had not adopted a rule or regulation "covering" the subject matter of Springston's state law tort claims. Therefore, Springston's claims are not preempted.

Finally, Congress repealed the FRSA in 1994 and replaced it with the Federal Railroad Safety Authorization Act, 49 U.S.C.

§ 20101 et seq, and revisited locomotive conspicuity measures in 49 U.S.C. § 20143. In that section, Congress directed the Secretary to prescribe final regulations requiring enhanced locomotive visibility measures "not later than December 31, 1997." 49 U.S.C. § 20143(e) (App. E). Hence, at the time that the District Court and the Sixth Circuit concluded that Springston's claims were preempted, (App. A,C), the Secretary still had not issued regulations covering Springston's state law tort claims. Consequently, Springston's state law tort claims should not have been preempted.

Because the Sixth Circuit's decision is squarely in conflict with the two decisions by the Supreme Court of Montana, as well as the history and purpose of the LBIA and FRSA, this Court is urged to take jurisdiction of this matter and articulate whether a state law claim for lack of locomotive conspicuity devices is preempted. There is a pressing

need for a clear statement of law on this issue.

Furthermore, this conflict is evident in other aspects of litigation involving railroad equipment, where a number of state courts have refused to preempt a plaintiff's state law claims. As will be shown, the thrust of these decisions is that a railroad is not necessarily free from negligence, even though it may have literally complied with safety statutes or rules, if the circumstances required it to do more. The Supreme Court of Arizona came to such a conclusion in DeElena v. Southern Pac. Co., 592 P.2d 759, 762 (Ariz. 1979). There, the decedent was killed when struck by a train at a crossing. The railroad sought to exonerate itself by arguing that it had complied with every applicable safety statute or rule, therefore any claims against it going beyond the safety statutes were preempted. The supreme court rejected the railroad's

argument, stating "whether a railroad is negligent in a particular manner, such as in failing to provide automatic crossing gates, is a question of fact for the jury."

Likewise, California rejects the notion that a railroad's mere compliance with various safety statutes preempts a plaintiff's state law tort claims. In Hogue v. Southern Pacific Co., 460 P.2d 965 (Cal. 1969), a railroad crossing incident in which a motorist was killed, the California Supreme Court held that statutory regulations "constitute only the minimum measure of care required by the railroad, and it is usually a matter for the jury to determine whether something more than the minimum was required under the evidence . . ." 460 P.2d at 968.

Illinois has held that a railroad's compliance with statutory regulations is not dispositive of the issue; the issue may be presented to a jury as to whether the railroad should have employed additional

safety measures. In the case of Rucker v. Norfolk & W. Ry. Co., 381 N.E.2d 715 (Ill. Ct. App. 1978), rev'd on other grounds 396 N.E.2d 534 (Ill. 1979), the plaintiff was killed by a defectively designed tank car that ruptured and exploded. The defendant railroad company argued that Congress had preempted any claims concerning tank car design and safety features based upon state law. The court of appeals rejected the railroad's argument, holding that the federal regulations did not "extend so far as to prohibit actions brought by injured persons against railroads or equipment manufacturers based upon a theory of strict liability in tort." Rucker, 381 N.E.2d at 721. The court added that an "individual's action for personal injuries based upon a defective design products liability theory does not run contrary to federal statutes dealing with railroad safety." Id. at 722.

Rucker was affirmed by the Supreme Court of Illinois, which held

> We do not believe that the presence of federal regulations on the subject precludes the imposition of tort liability according to state tort law standards more stringent than those contained in the federal regulations. We find no indication in the federal regulations that the preemption of state tort law was intended.

Rucker v. Norfolk & W. Ry., 369 N.E.2d 534, 537 (Ill. 1979). The court concluded that since the purpose of the regulations was to insure greater safety in railroad operations, the imposition of more stringent safety standards was not at all inconsistent with that purpose. Id.

Finally, the Court is referred to the decision of the Ohio Supreme Court in In re Miamisburg Train Derailment Litigation, 68 Ohio St. 3d 255, 626 N.E.2d 85 (1994). Miamisburg entailed a defectively designed

tank car which derailed and ruptured, releasing toxic fumes into a nearby community. The issue before the court was whether federal legislation preempted the plaintiffs' state law claims. The court reviewed the provisions of the FRSA and concluded that the federal regulations did not substantially subsume the subject matter of the plaintiffs' state law tort claims. The regulation in issue concerned tank cars manufactured after 1971. Because the subject tank car was built in 1966, the federal legislation did not apply. The Ohio Supreme Court concluded that the plaintiffs' claims were not preempted.

As can be seen then, there is a distinct conflict between the Sixth Circuit's decision in this case and the decisions of the Supreme Court of Montana. Furthermore, the Sixth Circuit's decision is inconsistent with the history and purpose of the FRSA and LBIA. Finally, numerous state courts have

refused to preempt a state law claim even where the railroad demonstrated compliance with federal regulations. In order to resolve this conflict, and in order to promote uniformity on the issue of whether state law claims for lack of railroad safety devices are preempted, this Court must take jurisdiction of this matter.

THE ISSUE WHETHER THE LBIA AND FRSA PREEMPT A PARTY'S STATE LAW TORT CLAIMS FOR LACK OF LOCOMOTIVE CONSPICUITY DEVICES IS AN IMPORTANT QUESTION WHICH SHOULD BE SETTLED BY THIS COURT

There are millions of railroad grade crossings in this country, with millions of motorists traversing those crossings every day. Unfortunately, thousands of train-car collisions occur every year, resulting in death and injury. Many of these collisions could have been avoided if the locomotives been equipped with conspicuity devices.

It is imperative that this Court avail itself of the opportunity to speak to the

issue of whether a state law tort claim for lack of locomotive conspicuity devices is preempted by federal law. The clear conflict between the Sixth Circuit's decision and the decisions of the Supreme Court of Montana is just one of many reasons for the Court to resolve this issue. A decision by this Court will also go a long way to reducing the conflict proliferating in many state courts on related aspects of railroad litigation.

CONCLUSION

For the reasons set forth above, Petitioner urges that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Opinion

6th Circuit Case Nº. 96-3571 and 96-3608
Filed November 19, 1997

Pages A-1 thru A-12

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0341P (6th Cir.)
File Name: 97a0341p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Robert S. Springston,	)	
Plaintiff-Appellant/	)	
Cross-Appellee,	)	
	)	**Nos. 96-3571/3608**
v.	)	
Consolidated Rail Corporation,	)	
Defendant-Appellee/	)	
Cross-Appellant,	)	
	)	
General Motors Corporation,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Northern District of Ohio at Toledo.
No. 93-07233--David A. Katz, District Judge.

Argued: June 5, 1997
Decided and Filed: November 19, 1997

Before: **MARTIN**, Chief Judge; **RYAN** and
BATCHELDER, Circuit Judges.

COUNSEL

ARGUED: Dennis R. Lansdowne, SPANGENBERG, SHIBLEY & LIBER, Cleveland, Ohio, for Appellant. Philip E. Howes, VOGELGESANG, HOWES, LINDAMOOD & BRUNN, Canton, Ohio, Thomas J. Sweeney, ECKERT, SEAMANS, CHERIN & MELLOTT, Pittsburgh, Pennsylvania, for Appellees.

ON BRIEF: Dennis R. Lansdowne, Justin F. Madden, John D. Liber, SPANGENBERG, SHIBLEY & LIBER, Cleveland, Ohio, Patricia A. Walker, Ralph E. Jocke, WALKER & JOCKE, Medina, Ohio, for Appellant. Philip E. Howes, Thomas R. Himmelspach, VOGELGESANG, HOWES, LINDAMOOD & BRUNN, Canton, Ohio, Robert B. Duaane, Canton, Ohio, Thomas J. Sweeney, Joseph M. Ramirez, ECKERT, SEAMANS, CHERIN & MELLOTT, Pittsburgh, Pennsylvania, for Appellees. David M. Heilbron, McCUTCHEN, DOYLE, BROWN & ENERSEN, San Francisco, California, Jeffrey Robert White, Washington, D.C., Allen Schulman, Jr., ALLEN SCHULMAN & ASSOCIATES, Canton, Ohio, for Amici Curiae.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Plaintiff appeals and defendant Consolidated Rail

Corporation ("Conrail") cross-appeals the judgment of the district court in this diversity action arising out of a collision between a Conrail train and a pick-up truck driven by plaintiff in northwest Ohio. For the reasons to follow, we AFFIRM the judgment of the district court.

I

On June 1, 1991, at approximately 11:30 p.m., while traveling east on Route 281 in rural northwest Ohio, Robert Springston drove his pick-up truck onto a Conrail main track, directly in the path of a northbound Conrail train. The resulting collision left Springston a quadriplegic.

The crossing at which this collision occurred was equipped with a crossbuck and an advance warning sign as required by law; it did not have lights or mechanical crossing gates. Springston had never traversed this crossing before and was not familiar with the area. Conrail's engineer testified that Springston had his dome light on and appeared to be looking at the seat or the floor next to him when he drove over the tracks. Springston does not deny this allegation and in fact indicates that he had been looking at a map on the seat next to him sometime prior to the collision.

Springston brought suit against Conrail, which owns the train and the track, and General Motors Corporation ("GM"), which manufactured the train. The district court granted summary judgment to the defendants on plaintiff's

claims of negligence based upon the lack of visual devices on the locomotive such as reflective tape, a strobe light, a ditch light, oscillating lights, and the color of the locomotive, finding that these claims were preempted by federal law. Subsequently, the court granted summary judgment to Conrail on plaintiff's punitive damages claim as well. The sole remaining claim, a claim against Conrail for negligence based on the adequacy of the warning devices installed at the crossing, went to trial, and the jury apportioned negligence 30% to Conrail and 70% to Springston. Springston appeals, asserting that the district court erred in granting summary judgment to GM, in granting partial summary judgment to Conrail, in the instructions to the jury, and in its evidentiary rulings. Defendant Conrail appeals a single evidentiary ruling.

II

A. FEDERAL PREEMPTION

The district court granted summary judgment to both defendants on plaintiff's claims of negligence based on the lack of extra-statutory warning signals on the train, holding that these claims were preempted by federal law. We review de novo the court's granting of summary judgment. *Harrow Products, Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015, 1019 (6th Cir. 1995).

Federal preemption of state law claims can be either express or implied. The district court inferred preemption

under the Boiler Inspection Act ("BIA").

> '[T]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the subject,' or because 'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.'

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Where Congress intends to occupy a field, state law in that field is preempted. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 212-213 (1983).

When facing a question of implied preemption, a court must begin with the presumption that the state law is valid.

> "'It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.'"

New York State Dept. of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973) (citation omitted).

Plaintiff claims that GM was negligent in its design and manufacture of the train in question because it was not equipped with certain warning devices above and beyond those devices required by federal law, and that Conrail was negligent because it operated the train in that defective condition. Defendants counter by arguing that state law tort claims based upon the need for such extra-statutory devices are preempted by federal law. The defendants have the better argument.

In 1893, Congress enacted the first of multiple statutes collectively known as the Safety Appliance Acts ("SAA"). *Baltimore and O.R.R. v. Jackson*, 353 U.S. 325, 338 (1957) (Burton, J., dissenting). A related act, the BIA, was first enacted in 1911. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983). Through these acts, Congress conferred on the Interstate Commerce Commission ("ICC") full authority over "the entire locomotive and tender and all parts and appurtenances thereof." *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 608 (1926) (quoting BIA amendment of 1915). That power was transferred from the ICC to the Department of Transportation in 1966 by the Department of Transportation Act. Marshall, 720 F.2d at 1152.

At the time plaintiff filed his complaint, these acts were codified within 45 U.S.C. ^U^U 1-43. As of July 5,

1994, Congress repealed 45 U.S.C. ^U^U 1-43. Pub. L. No. 103-272, ^U 7(b), 108 Stat. 1379. The Acts' provisions were transferred and re-codified at 49 U.S.C. ^U^U 20301- 20306 and 20701-20903. Pub. L. No. 103-272, ^U 1(e), 108 Stat. 881-883 and 885-887. *See Moses v. Union Pacific R.R.*, 64 F.3d 413, 418 (8th Cir. 1995).

In Napier, the Court considered whether Congress had intended to occupy the field of locomotive equipment to the exclusion of state authority when it enacted the BIA. The Napier Court held that the intention was to occupy the field, preempting state law claims. Napier, 272 U.S. at 613.

In Marshall, 720 F.2d 1149, the Ninth Circuit considered a claim identical to that of Springston: whether the railroad could be liable for a grade crossing collision under a claim alleging common-law negligence for failing to install different headlights on a locomotive. The Marshall court held that the common law was preempted under the BIA, stating:

> [W]e hold that under the [BIA] the state may not impose liability for failure to install a part or attachment of a locomotive if it is 'within the scope of the authority of the [Secretary]' to prescribe the same part or attachment. It is within the scope of the Secretary's authority to prescribe strobe or

> oscillating lights for locomotives, and any state regulation is therefore preempted

Id. at 1152 (quoting Napier, 272 U.S. at 611). *See also Eldridge v. Missouri P.R.R.*, 832 F. Supp. 328 (E.D. Okla. 1993) (granting partial summary judgment on plaintiff's claim that the locomotive involved in the crossing collision was equipped with inadequate warnings, holding that the claim was preempted under the BIA).

Contrary to plaintiff's argument, the preemptive effect of the BIA on state regulation of locomotive equipment was not affected or modified by the Federal Railroad Safety Act ("FRSA") which was enacted in 1970. The Marshall court addressed this issue, holding that the FRSA "does not subsume, replace, or recodify any acts. The logical inference from this structure is that Congress intended to leave unchanged the force and effect of existing federal regulatory statutes." *Id.* at 1153. The Marshall court noted that the objective of the FRSA, to achieve national uniformity of railroad regulation, 49 U.S.C. ^U 20106, would be undermined if the FRSA were read to repeal preemption under the BIA. *Id.* Federal law preempts plaintiff's claims based upon the need for extra-statutory warning devices on the train. The district court was correct in granting summary judgment for defendants on this issue.

B. PUNITIVE DAMAGES

The district court granted Conrail's motion for summary judgment on the issue of punitive damages. The court's granting of summary judgment is reviewed de novo. *Harrow Products, Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015, 1019 (6th Cir. 1995).

In Ohio, punitive damages are available in civil tort actions upon a finding of actual malice. *Edmondson v. Steelman*, 622 N.E.2d 661, 663 (Ohio App. 1992). The Ohio Supreme Court in *Preston v. Murty*, 512 N.E.2d 1174 (Ohio 1987), held that actual malice may be demonstrated by showing (1) that state of mind under which a person's conduct is characterized by hatred, ill-will, or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. The Court in Preston discussed the policy behind punitive damages as follows:

> The policy for awarding punitive damages in Ohio '* * * has been recognized * * * as that of punishing the offending party and setting him up as an example to others that they might be deterred from similar conduct.' Since punitive damages are assessed for punishment and not compensation, a positive element of conscious wrongdoing is always required. This element has been termed conscious,

> deliberate or intentional. It requires the party to possess knowledge of the harm that might be caused by his behavior.

Id. at 1176 (citation omitted).

When considering punitive damages, "misconduct greater than mere negligence is required." *Calmes v. Goodyear Tire & Rubber Co.*, 575 N.E.2d 416, 419 (Ohio 1991).

The concept requires a finding that the probability of harm occurring is great and that the harm will be substantial. A possibility or even probability will not be enough as that requirement would place the act in the realm of negligence. A requirement of substantial harm would also better reflect the element of outrage required to find actual malice. Preston, 512 N.E.2d at 1176. Nothing in the record supports plaintiff's argument that the issue of punitive damages should have gone to the jury. The district court was correct in granting summary judgment for the defendants on this ground.

C. JURY INSTRUCTION REGARDING THE DUTY OF CARE

Plaintiff argues that the district court gave the wrong instruction regarding the duty of care owed to plaintiff by the defendant railroad. Plaintiff's argument involves interpretation of Ohio law, specifically the standard of care as articulated in *Matkovich v. Penn Central Transp. Co.*, 431 N.E.2d 652 (Ohio 1982) and in *Hood v. New York, C.*

& St. L.R.R., 144 N.E.2d 104 (Ohio 1957). We need not address plaintiff's argument regarding the correct jury instruction because this issue was mooted by the outcome of the case, as evidenced by the jury's response to the interrogatory addressing the negligence of Conrail. *Shepherd v. Puzankas*, 355 F.2d 863, 865 (6th Cir. 1966) (argument of error as to jury instruction mooted by ultimate response of jury). Interrogatory number two asked "[o]f what did the negligence of Consolidated Rail Corporation consist?" The jury responded: "Absence of active warning systems based on traffic flow for St Rt 281 crossing." This response makes it evident that the jury focused on the actions of the railroad and found the railroad negligent in failing to provide extra-statutory warnings at the intersection. The plaintiff, having prevailed on this issue, can show no prejudice resulting from the jury instruction.[1]

D. CLAIMS OF EVIDENTIARY ERROR

The remaining alleged errors, those of both plaintiff and defendant, involve evidentiary matters. "A district

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[1] In any event, we note that this court has recently held that Hood and Matkovich are not in conflict, but rather that where the crossing is "extra-hazardous," the railroad's duty to use ordinary care to protect the safety of motorists may require the installation of extra-statutory warning devices. Hostetler v. Consolidated Rail Corp., 123 F.3d 387 (6th Cir. 1997).

court's evidentiary determinations are subject to an abuse of discretion standard of review." *Hancock v. Dodson*, 958 F.2d 1367, 1371 (6th Cir. 1992). Having thoroughly reviewed the record and having heard oral argument, we now hold that the district court did not abuse its discretion as to any of the evidentiary rulings now claimed as error. The district court is affirmed as to all remaining issues on appeal.

The orders of the district court are **AFFIRMED**.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Order Denying Petition
For Rehearing *En Banc*

6th Circuit Case Nº. 96-3571 and 96-3608
Filed January 22, 1998

Pages B-1 thru B-2

Nos. 96-3571 and 96-3608

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT S. SPRINGSTON	)	
Plaintiff-Appellant/Cross Appellee,	)	**ORDER**
	)	**DENYING**
v.	)	**PETITION**
	)	**FOR REHEARING**
CONSOLIDATED RAIL CORPORATION;	)	
Defendant-Appellee/Cross-Appellant,	)	
GENERAL MOTORS CORPORATION,	)	**Filed**
Defendant-Appellee.	)	**Jan. 22, 1998**
	)	**Leonard Green,**
	)	**Clerk**

Before: **MARTIN**, Chief Judge; **RYAN**, and **Batchelder**, Circuit Judges.

The court having received a petition for rehearing en banc, and thepetition having been circulated not only to the originalpanel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestions for rehearing en banc, the peitition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

were fully considered upon the original submittsion and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

MEMORANDUM OPINION
by Judge Dowd

District Court Case Nº. 3:93-CV-7233
Filed July 5, 1994

Pages C-1 thru C-26

Robert S. SPRINGSTON,
Plaintiff,

v.

CONSOLIDATED RAIL CORP., et al., ***Defendants.***

No.3:93 CV 7233.

United States District Court,
N.D. Ohio,
Western Division.

July 5, 1994.

Motorist injured in a collision with locomotive at grade crossing brought negligence and products liability action against railroad and locomotive manufacturer. On railroad's and manufacturer's motions for summary judgment, the District Court, Dowd, J., held that: (1) Boiler Inspection Act preempted motorist's state law claims, and (2) railroad was entitled to summary judgment on motorist's claim of defective locomotive.

Granted.

1. Federal Civil Procedure 247O.4

Summary judgment is appropriate where there are no genuine issues of material fact and moving party is entitled to judgment as matter of law. Fed.Rules Civ.Proc. Rule 56, 28 U.S.C.A.

2. **Federal Civil Procedure 2544**

Favorable treatment of facts and inferences for party opposing motion for summary judgment does not relieve that party of its responsibility to go beyond pleadings to oppose otherwise properly supported motion for summary judgment. Fed.Rules Civ.Proc. Rule 56, 28 U.S.C.A.

3. **Federal Civil Procedure 2544**

Once moving party satisfies its burden to show absence of evidence to support non-moving party's case, party in opposition to summary judgment motion may not rest upon mere allegations or denials of its pleading, but must set forth specific facts showing that there is genuine issue for trial. Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A.

4. **Federal Civil Procedure 2546**

General averments or conclusional allegations of affidavit do not create specific fact disputes for summary judgment purposes. Fed. Rules Civ. Proc. Rule 56(e), 28 U.S.C.A.

5. **States 18.3**

Doctrine of preemption, derived from supremacy clause of Federal Constitution, is designed to prevent states from impinging too much on federal law and policy. U.S.C.A. Const. Art. 6, cl. 2.

6. **States 18.7**

Where Congress intends to occupy field, state law in that field is preempted. U.S.C.A. Const. Art. 6, cl. 2.

7. **States 18.3**

When facing question of implied preemption, court must begin with presumption that state law is valid.

8. **Products Liability 62**
Railroads 312.1
States 18.21, 18.65

Boiler Inspection Act preempted motorist's state common law and products liability causes of action against railroad and locomotive manufacturer arising from train-car collision at railway crossing; allowing state tort claims to stand would result in requirements of reflective material, and oscillating, strobe, or ditch lights on locomotives, which would be additional to federal requirements, comprising nationally uniform standard of regulating locomotive equipment. Ohio R.C. §§ 1302.27, 1302.28, 2307.75(A), 2307.77; Boiler Inspection Act, 45 U.S.C. (1988 Ed.) § 22 et seq.; Federal Railroad Safety and Hazardous Materials Transportation Control Act of 1970, § 101 et seq., 45 U.S.C. (1988 Ed.) § 421 et seq.

9. Federal Civil Procedure 2485

Summary judgment was appropriate on motorist's claim that locomotive involved in collision with his automobile was defective, where railroad argued it satisfied its duty as to locomotive by meeting safety standards established by the Federal Railroad Safety Act in the Boiler Inspection Act, and motorist did not respond to railroad's request for summary judgment. Fed. Rules Civ. Proc. Rule 56(e), 28 U.S.C.A.; boiler inspection Act, 45 U.S.C. (1988 Ed.) § 22 et seq.; Federal Railroad Safety and Hazardous Materials Transportation Control Act of 1970, § 101 et seq., 45 U.S.C. (1988 Ed.) § 421 et seq.

10. Federal Civil Procedure 2544

Nonmoving party bears responsibility to demonstrate that summary judgment is inappropriate. Fed. Rules Civ. Proc. Rule 56, 28 U.S.CA.

John Douglas Liber, Dennis R. Lansdowne, Spangenherg, Shibley, Traci, Lancione & Liber, Cleveland, OH, Ralph E. Jocke, Patricia Ann Walker, Walker & Jocke, Medina, OH, for plaintiff.

Richard S. Milligan, Philip E. Howes, Thomas R. Himmelspach, Robert B. Daane, Vogelgesang, Howes, Lindamood & Brunn, Canton, OH, for Consolidated Rail Corp.

Thomas J. Sweeney, Pietragallo, Bosick & Gordon, Pittsburgh, PA for General Motors Corp.

David J. Hanna, Buckingham, Doolittle & Burroughs, Akron, OH, for David J. Hanna.

MEMORANDUM OPINION

DOWD, District Judge.

This case is before the Court on the motion of defendant General Motors Corporation, Electro-Motive Division ("General Motors") summary judgment, and the motion of defendant Consolidated Rail Corporation ("Conrail") for partial summary judgment. Plaintiff opposes both motions, and both Conrail and General Motors have filed reply briefs. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

I. FACTUAL BACKGROUND

This case arises out of a collision between a car and a train at a railroad crossing in northwestern Ohio, south of Bowling Green. The driver of the car was plaintiff Robert Springston, who was en route from the University of Southern Illinois to Crotch Island, Maine. The collision occurred at approximately 11:30 p.m. when Conrail's train was traveling northbound on the single, main track, and Springston was traveling east on Route 281. Springston's

pickup truck was struck when he drove in front of the train. Springston was rendered a quadriplegic.

Springston brings this action against Conrail, alleging, in part, that Conrail caused the collision by negligently falling to install different warning equipment on the locomotive.[1] Specifically, plaintiff alleges that the lead locomotive was not equipped with the audible warning devices or the visual warning devices necessary to warn of the trains presence, and was not painted so as to warn of the train's presence. Plaintiff also alleged that Conrail caused the collision by operating the train with a "defective" locomotive.

Springston also brings suit against General Motors, the manufacturer of the locomotive at issue, alleging again that the locomotive was defective. Springston presents his claims against General Motors pursuant to Ohio Revised Code §§ 2307.75(A) (product defective in design or formulation), 2307.77 (products defective due to non-conformance with manufacturers' representation), 1302.27 (implied warranty, merchantability; usage of trade), and

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[1] Plaintiff also alleges in Count II of his Complaint, that Conrail is liable for plaintiffs injuries because it knew of ultrahazardous conditions at the crossing where the accident took place, but failed to take steps to make the crossing safer. This Count is not at issue in the summary judgment motions at bar.

1302.28 (implied warranty; fitness for a particular purpose). Plaintiff also alleges a claim for punitive damages against General Motors.

Both Conrail and General Motors have moved for summary judgment. Although the two defendants filed separate motions for summary judgment, both defendants present the same issue: are plaintiffs claims that the locomotive should have been equipped with reflective materials and strobe, ditch and/or oscillating lights preempted by the Boiler Inspection Act ("BIA"), 45 U.S.C. § 22, *et seq.*, or the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 421, *et seq.*? Conrail also asks for summary judgment on plaintiffs claim that the locomotive at issue was defective.

II. SUMMARY JUDGMENT STANDARD

[1,2] Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56 When considering a motion for summary judgment, "the inferences to be drawn from the underling facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold*, 369 U.S. 654, 655, 82 5.Ct. 993, 993, 8 L.Ed.2d 176 (1962). *See e.g., United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 562 (6th Cfr.1985) and cases cited therein.

The Court's favorable treatment of facts and inferences, however, does not relieve the nonmoving party of his responsibility "to go beyond the pleadings" to oppose an otherwise properly supported motion for summary judgment under Rule 56(e). *See Celotex Corp. V. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

[3,4] Once the moving party satisfies his burden to show an absence of evidence to support the nonmoving party's case, *Celotex Corp. v. Catrett*, 477 U.S. at 323, 106 S.Ct. at 2552, the party in opposition "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256,106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). Although the showing required of the nonmoving party by Rule 56 does not go so far as to require that all opposition evidence be in a form admissible at trial, the rule does require the nonmoving party who has the burden of proof at trial to oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings them-selves...." *Celotex Corp. v. Catrett*, 477 U.S. at 324, 106 S.Ct. at 2553. General averments or conclusional allegations of an affidavit, however, do not create specific fact disputes for summary judgment purposes. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-899, 110 S.Ct. 3177, 3188-899, 111 L.Ed.2d 695 (1990). Furthermore, unsworn statements and affidavits

composed of hearsay and nonexpert opinion evidence, "do not satisfy Rule 56(e) and must be disregarded." *See Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968-69 (6th Cir.1991) (quoting *State Mut. Life Assurance Co. of Am. V. Deer Greek Park*, 612 F.2d 259, 264 (6th Cir.1979) and citing *Adickes V. S.H. Kress & Co.*, 398 U.S. 144, 158 n. 17, 90 S.Ct. 1598, 1609 n. 17, 26 L.Ed.2d 142 (1970)). Nor may a party "create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts [] earlier deposition testimony." *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986) (citing *Biechele v. Cedar Point, Inc.*, 747 F.2d 209, 215 (6th Cir. 1984)).

On a motion for summary judgment, the Court will consider "[o]nly disputes over facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. at 2510. Nonmaterial facts will not he considered. Neither will the judge attempt to weigh the material evidence or determine its truth. *Anderson v. Liberty Lobby*, 477 U.S. at 249, 106 S.Ct. at 2510. The judge's sole function will be to determine whether there is a genuine issue for trial such that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* (citations omitted).

Where the non-moving party "has failed to make a sufficient showing on an essential element of her case with

respect to which she has the burden of proof," summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. at 323, 106 S.Ct. at 2552 (equating the standard for a directed verdict under Rule 50(a) with the summary judgment standard of Rule 56). If the evidence is "merely colorable," or is "not significantly probative," the Court may decide the legal issue and grant summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. at 249, 106 S.Ct. at 2510-11 (citing *Dombrouwski v. Eastland*, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967) (*per curiam*) and *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968)). "'The mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."' *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir.1989) (quoting *Anderson v. Liberty Lobby*, 477 U.S. at 252, 106 S.Ct. at 2512).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby*, 477 U.S. at 250, 106 S.Ct. at 2511.

III. LAW AND DISCUSSION

A. The Preemption Doctrine

[5] Article VI, the Supremacy Clause of the United States Constitution, declares:

> This Constitution, and the laws of the United States which shall be made in Pursuant thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall he the supreme law of the Land
>
> ...

It is from this Supremacy Clause that the doctrine of preemption is derived. It is designed to prevent the States from impinging too much on federal law and policy. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986).

[6] The Supreme Court has laid the path to be followed in a preemption analysis. Congress may, of course, expressly state that state law is preempted. If no such statement is made, however, preemption may he inferred because

> "the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude

enforcement of state laws on the subject," or because " the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose."

Fidelity Fed'l Savings & Loan Ass'n v. & de la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). Where Congress intends to occupy a field, state law in that field is preempted. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 212-213, 103 S.Ct. 1713, 1726-1727, 75 L.Ed.2d 752 (1983).

[7] When facing a question of implied preemption, a court must begin with the presumption that the state law is valid. "It will not be presumed that a federal statue was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973) (quoting *Schwartz v. Texas*, 344 U.S. 199, 202-203, 73 S.Ct. 232, 235, 97 L.Ed. 231(1952)).

[8] Defendants argue that the BIA occupies the field of locomotive equipment regulation, and therefore preempts plaintiff's state law causes of action. The BIA was enacted in 1911, and conferred on the Interstate Commerce

Commission ("ICC") (now the Secretary of Transportation and the Federal Railroad Commission ("FRA")) full authority over "the entire locomotive and tender and all parts and appurtenances thereof." *Napier v. Atlantic C.L.R. Co.*, 272 U.S. 605, 608, 47 S.Ct. 207, 208, 71 L.Ed. 432 (1926) (quoting BIA amendment of 1915).

The BIA, 45 U.S.C. § 23, provides:

> It shall be unlawful for any railroad to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such railroad without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

In *Napier*, the Court considered whether Congress had intended to occupy the field of locomotive equipment to the exclusion of state authority when it enacted the BIA. In that case, the railroad sought to enjoin enforcement of a

Georgia statute requiring locomotives to have automatic fire box doors, and to enjoin enforcement of a Wisconsin statute requiring locomotive cabs to be equipped with a cab curtain. The Court concluded that the BIA gave the ICC full authority over "the design, the construction and the material of every part of the locomotive and tender and of all the appurtenances," and held that Congress had intended the BIA to occupy the field. The Court held that the state fire door and cab curtain laws were preempted under the BIA, even though the ICC had not issued any regulations regarding those matters. The Court opined:

> The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We held that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field.

Id. at 613, 47 S.Ct. at 210. The Court held that locomotive cab curtains and automatic fire doors were "in their nature within the scope of authority delegated to the commission," *Id.* at 611, 47 S.Ct. at 209, and therefore that the state statutes were preempted.

Where the federal government has occupied a field, "the test of preemption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" *Pacific Gas & Electric*, 461 U.S. at 212-

213, 103 S.Ct. at 1726-1727 (citations omitted). Thus, defendants argue that Congress has provided for federal authority to occupy the field of locomotive equipment, and any state regulation on the subject of locomotive equipment is preempted.

In *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir.1983), the Court considered a claim identical to that of Springston: whether the railroad could be liable for a grade crossing collision under a claim alleging common law negligence for failing to install different headlights on a locomotive. The *Marshall* court held that the common law was preempted under the BIA, stating:

> [W]e hold that under the [BIA] the state may not impose liability for failure to install a part or attachment of a locomotive if it is "within the scope of the authority of the [Secretary)" to prescribe the same part or attachment.... It is within the scope of the Secretary's authority to prescribe strobe or oscillating lights for locomotives, and any state regulation is therefore preempted.

Id. at 1152. See also *Eldridge v. Missouri Pacific Railroad*, 832 F.Supp. 328 (E.D.Okla. 1993) (court granted partial summary judgment on plaintiff's claim that the locomotive involved in the crossing collision was equipped with inadequate warnings, stating that the claim was preempted under the BIA).

Defendants further argue that the preemptive effect of the BIA on state regulation of locomotive equipment was not affected or modified by the FRSA, which was enacted in 1970. The *Marshall* court addressed this issue, stating that the FRSA conferred upon the Secretary the authority to adopt regulations supplementing provisions of law and regulations that were in effect prior to the enactment of the FRSA. "It does not subsume, replace, or recodify any acts. The logical inference from this structure is that Congress intended to leave unchanged the force and effect of existing federal regulatory statutes." *Id.* at 1153. The *Marshall* court noted that the objective of the FRSA to achieve national uniformity of railroad regulation, 45 U.S.C. § 434, would be undermined if the FRSA were read to repeal preemption under the BIA. *Id.*

Thus, defendants argue that the BIA preempts plaintiff's state law claims. Plaintiffs cannot, therefore, impose on defendants any common law duty to install different equipment on its locomotives, and summary judgment is warranted.

Plaintiff argues that the BIA does not apply in this case. Plaintiff asserts that the BIA was passed in response to dangers of railroading as an occupation, and that its purpose was to protect railroad employees by requiring railroad companies to provide safe equipment for their employees to work with. *See, e.g., Baltimore & Ohio R. Co. v. Groeger*, 266 U.S. 521, 45 S.Ct. 169, 69 L.Ed. 419

(1925); *Gowins v. Pennsylvania R.R. Co.*, 299 F.2d 431, 434 (6th Cir. 1962), *cert. denied*, 371 U.S. 824, 83 S.Ct. 44, 9 L.Ed.2d 64 (1962).

As further support for his argument, plaintiff points out that under the BIA, an injured railroad employee does not have a cause of action. Instead, an action for violation of the BIA is prosecuted as an action under the Federal Employers' Liability Act ("FELA"), 45 U.S.A. § 51(1988). Therefore, only railroad employees--not bystanders--can bring a cause of action for a violation of the BIA. Thus, plaintiff contends that the structure of the BIA indicates that it was enacted solely to protect railroad employees, and has no effect on bystander claims.

Plaintiff argues that it is the FRSA, not the BIA, that addresses the problem of bystander safety. Plaintiff cites the legislative history of the FRSA in support of the argument that although earlier enactments like the BIA had been effective and would be continued without change, "they [met] only certain and special types of railroad safety hazards." H.R.CONF.REP. NO. 91-1191, 91st Cong., 2nd Sess. reprinted in 1970 U.S. Code Cong. & Admin. News 4104. "These and other rail safety statutes have been reasonably effective in their respective areas. They were enacted to protect employees against particular hazards and the enforcement of their provisions over the years has saved lives." *Id.* However, in light of the number of crossing collisions, derailments, and spills, the public at large needed

to be protected with federal legislation, thus warranting the enactment of the FRSA. *Id.*

Plaintiff does not offer any case law as support for his assertion that the BIA does not preempt his state law claims. Plaintiff argues that the *Marshall* case was wrongly decided and should be disregarded. Specifically, plaintiff argues that the *Marshall* court overlooked the fact that Napier involved railroad employee safety rather than by-stander safety. Further, plaintiff claims that the *Marshall* case is distinguishable from the case at hand because it was decided before the 1992 amendments, codified at 45 U.S.C. § 431(1993), to the FRSA which authorized the Secretary of Transportation to initiate proceedings to address the utility of locomotive conspicuity devices.[2] According to

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[2] (u) Locomotive Conspicuity
(1) The Secretary shall conduct a review of the Department of Transportation's rules with respect to locomotive conspicuity research no later than December 31, 1993. As part of this review, the Secretary shall collect relevant data from operational experience by railroads having enhanced conspicuity measures in service.
(2) Not later than December 31, 1992, the Secretary shall issue interim regulations identifying ditch lights, crossing lights, strobe lights, and oscillating lights as interim locomotive conspicuity measures, and authorizing and encouraging installation and use

plaintiff, these amendments evidence the fact that Congress clearly viewed locomotive conspicuity as a matter to be regulated under the FRSA.

In short, plaintiff argues that Congress has consistently referred to the BIA as a statute for the protection of railroad employees rather than bystanders, and because the intent of Congress is critical in a preemption determination, the plaintiff's common law and products liability claims are not preempted by the BIA.

Plaintiff's argument is not well-taken. This Court

> of such measures....
> (3) Not later than June 30.1994, the Secretary shall initiate a rulemaking proceeding to issue final regulations requiring substantially enhanced locomotive conspicuity measure. In such rulemaking proceeding, the Secretary shall consider, at a minimum--
> (A) revisions to the locomotive headlight standard, including standards for placement arid intensity;
> (B) requiring use of reflective materials to enhance locomotive conspicuity;
> (C) requiring use of additional alerting lights (including ditch, crossing, strobe, and oscillating lights);
> (D) requiring use of auxiliary lights to enhance locomotive conspicuity when viewed from the side;
> (E) the effect of any enhanced conspicuity measures on the vision, health and safety of train crew members; ...

45 U.S.C. § 431(u).

agrees with the *Marshall* court that the common law was preempted under the BIA. It is within the scope of the Secretary's authority to prescribe reflective materials or strobe, ditch or oscillating lights for locomotives, and any state regulation is therefore preempted.

Plaintiff's argument is not well-taken. The Supreme Court, in *Napier*, specifically described the BIA as "preemptive of any state or local regulation on the same subject." *Napier* 272 U.S. at 612-613, 47 S.Ct. at 210. "The power delegated to the [agency] ... extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611, 47 S.Ct. at 209. It is irrefutable that reflective materials and oscillating, strobe and ditch lights are parts of appurtenances of the locomotive.

Moreover, the very language of the *Napier* opinion refutes plaintiff's argument that because the purpose of the BIA was to protect railroad employees rather than by-standers, plaintiff's state law tort claims are not preempted. The *Napier* Court stated:

> The argument mainly urged by the states, in support of the claim that Congress has not occupied the entire field, is that the federal and the state laws are aimed at distinct and different evils; that the federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state

> regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. Did Congress intend that there might still be state regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?

Napier, 272 U.S. at 612, 47 S.Ct. at 209-210. The Court found that the state statutes at issue and the federal regulations were directed at the same objective--the equipment of locomotives. It did not matter that the state statutes were directed to a different purpose; rather, what mattered was that the state statutes sought to regulate equipment on the locomotive. The Court opined that "[b]ecause the standard set by the Commission must prevail, requirements by the states are precluded, . however commendable or however different their purpose." *Id.* at 613, 47 S.Ct. at 210.

Thus, it is not the purpose of locomotive requirements that is important.[3] The statutes at issue in

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[3] The Court notes that, although the BIA was clearly enacted for the primary purpose of protecting railroad

Napier could not be upheld because they placed additional requirements on locomotives. The Court deemed it irrelevant that the requirements were aimed at a different purpose than was the BIA. Similarly, in the case at bar, to allow plaintiff's state tort claims to stand would result in requirements of reflective material, oscillating, strobe and/or ditch lights on locomotives. Such lights are additional requirements on locomotives, even if they are aimed at a different evil than are headlights. As the *Napier* Court found, the BIA is preemptive of any state or local regulation on the same subject. Accordingly, pursuant to the reasoning set forth in *Napier*; plaintiff's state law negligence and product liability causes of action are preempted.

Further, this Court notes that plaintiff ignores the effect on the regulation of railroads that the adoption of his argument would have. It is clear that Congress intended to provide a nationally uniform standard of regulating locomotive equipment. If each state is permitted to make its own decisions with respect to such items as reflective materials, oscillating, strobe and ditch lights, such goal would be compromised.

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workers, it is also true that the BIA was also enacted to promote the safety of passengers and the public generally. *Brown v. Chicago, R.I & P.R. Co.*, 108 F.Supp. 164 (N.D.Iowa 1952) (citation omitted).

Conrail also points out, in refuting plaintiff's arguments, that, in response to 45 U.S.C. § 431(u), directing the Secretary to issue interim regulations regarding addition-a' locomotive lights, the FRA, at 58 Fed.Reg. 6899-649644 (May 13, 1994), issued 49 C.F.R. § 229.123. The authority for that section is listed in part as "45 U.S.C. § 22-23, as amended; 45 U.S.C. 431, 438 as amended". 45 U.S.C. § 22-33 is the BIA. If, as plaintiff urges, locomotive conspicuity is a matter that relates solely to bystander safety and is therefore unrelated to the BIA, the FRA would not have cited that act as the issuing authority.

In short, this Court is not persuaded by Springston's arguments regarding the BIA, and finds that plaintiffs state common law and products liability causes of action are indeed preempted. General Motors' motion for summary judgment and Conrail's motion for partial summary judgment on the issue of preemption will therefore be granted.

B. Claim of A Defective Locomotive

[9] Conrail also asks for summary judgment on plaintiffs claim that the locomotive was defective, stating that to recover on such a claim, plaintiff will have to establish that Conrail breached a duty it owed to plaintiff and that the breach was the proximate cause of the collision. *Moncol v. Board of Educ.*, 55 Ohio State 2d 72, 9 O.O.3d 75, 378 N.E.2d 155 (1978). Conrail argues that

its duty with respect to the locomotive was to meet the safety standards established by the FRA in the BIA Conrail argues that the evidence before the Court shows that it did meet those requirements. Plaintiff does not respond to Conrail's request for summary judgment on the claim of a defective locomotive.

[10] Under Fed.R.Civ.P. 56(e), plaintiff, as the non-moving party, bears the responsibility to demonstrate that summary judgment is inappropriate. "The adverse party may not rest upon the mere allegations or denials of [his] pleadings, but [his] response, by affidavits or otherwise ..., must set forth specific facts showing there is a genuine issue for trial. If [he] does not so respond, summary judgment, if appropriate, shall be entered against [him]." Fed.R.Civ.P. 56(e). "[I]f the non-moving party fails to discharge that burden [of setting forth specific facts showing there is a genuine issue for trial]--for example, by remaining silent--its opportunity is waived and its case wagered." *Gudrino v. Brookfield Township Trustees*, 980 F.2d 399, 405 (6th Cir.1992). As plaintiff has not responded to Conrail's request for summary judgment on the claim of a defective locomotive, summary judgment will be granted to Conrail on such claim.

IV. CONCLUSION

For the reasons set forth above, this Court will grant Conrail's motion for partial summary judgment and General

Motors motion for summary judgment, Plaintiff's cause of action against General Motors is, therefore, closed. Plaintiff still, however, has a cause of action against Conrail based on Count II of the Complaint which deals with the allegation of an unsafe crossing.

IT IS SO ORDERED.

JUDGMENT ENTRY

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, AD-JUDGED and DECREED that the motion for summary judgment of defendant General Motors Corporation, Electro-Motive Division is granted. Further, the motion for partial summary judgment of defendant Consolidated Rail Corporation is also granted.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

ORDER by Judge J. Katz

District Court Case №. 3:93-CV-7233
Filed March 24, 1996

Pages D-1 thru D-6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT S. SPRINGSTON,	)	
	)	**Case No.3:93 CV 7233**
Plaintiff,	)	
	)	
-v-	)	**ORDER**
	)	
CONSOLIDATED RAIL	)	**KATZ, J.**
CORPORATION, *et al.*,	)	**Filed**
Defendants.	)	**Mar. 24 1996**

This case is scheduled for trial on March 26, 1996. The Court anticipates that trial will last approximately two weeks. A number of motions, primarily motions *in limine,* remain for the Court's attention.

I. Defendant's Motion *in Limine* (Doc. No.196) for an order barring Plaintiff from presenting evidence on the availability or use of locomotive equipment different from what was on the locomotive involved in this case, including but not limited to "ditch lights," different horns, etc. is **GRANTED**. The Court has already granted summary judgment that the equipment on the locomotive was not defective or substandard.

II. **Defendant's Motion *in Limine*** (Doc. No.196) for an order barring Plaintiff from presenting evidence that the locomotive was defective or substandard is **GRANTED**, for the reason given in (I).

III. **Defendant's Motion *in Limine*** (Doc. No.196) for an order barring Plaintiff from presenting evidence on the sound level of the locomotive horn is **GRANTED**. It is not disputed that the volume met FRA standards.

IV. **Defendant's Motion *in Limine*** (Doc. No.196) for an order barring Plaintiff from presenting any materials regarding plans for a project to install active warning devices at the crossing is **GRANTED**. Such evidence is barred under 23 U.S.C. § 409.

V. **Defendant's Motion *in Limine*** (Doc. No.196) for an order barring Plaintiff from presenting evidence regarding implementation of a project to install active warning devices at the crossing is **GRANTED**. Such evidence is barred under 23 U.S.C. § 409.

VI. **Defendant's Motion *in Limine*** (Doc. No.196) for an order barring Plaintiff from presenting evidence concerning prior vehicle/train collisions at the crossing that occurred under circumstances different from those of this case is **GRANTED**. Such evidence is irrelevant. This

order does not bar Plaintiff from presenting evidence concerning prior vehicle/train collisions at the crossing that occurred under circumstances highly similar to those of this case.

VII. Defendant's Motion *in Limine* (Doc. No.196) for an order barring Plaintiff from arguing that the train was traveling at an unsafe speed at the time of the collision is **GRANTED**. There has been no allegation that the train was exceeding the track speed limit at the time of the collision.

VIII. Defendant's Motion *in Limine* (Doc. No.196) for an order barring Plaintiff from presenting night-time videotapes of the crossing from June 12, 1991 and June 3, 1992 is **DENIED**, in accordance with the agreement of the parties.

IX. Defendant's Motion *in Limine* (Doc. No.196) for an order barring Plaintiff from presenting evidence suggesting that Robert Springston remembers any circumstances of the accident is **DENIED**. Should Plaintiff now claim that he remembers any circumstances of the accident, the proper way to deal with such matter is by impeachment on cross-examination.

X. Defendant's Motion *in Limine* (Doc. No.196) for an order barring Plaintiff from presenting any materials that

have not been disclosed is **GRANTED**, pursuant to Fed. R. Civ. P.37(c).

XI. Defendant's Motion *in Limine* (Doc. No.197) for an order excluding the testimony of Plaintiff's witness August Westphal is **GRANTED**.

XII. Defendant's Motion *in Limine* (Doc. No.198) for an order excluding the testimony of Plaintiff's witness William Douglas Berg is **GRANTED IN PART** and **DENIED IN PART**.

Testimony that the crossing should have been equipped with active warning devices will be excluded. Testimony that Plaintiff had insufficient time to discover and react to the train will be excluded.

Testimony that the train crew may have been mistaken in perceiving the dome light to be on in Plaintiff's truck will be permitted.

As to testimony that the crossing was extra-hazardous, such testimony will be excluded to the extent that Berg's opinion is based on information contained in records that are made impermissible under 23 U.S.C. § 409, *i.e.*, information compiled for evaluating or planning safety enhancement of the crossing, and permitted to the extent that Berg's opinion is based on information obtained from other sources.

XIII. Defendant's Motion *in Limine* (Doc. No.203) for an order barring Defendant from arguing that Plaintiff had a duty to approach the crossing at slower than 25 miles per hour is **GRANTED**.

XIV. Defendant's Motion *in Limine* (Doc. No.204) for an order barring Defendant from arguing that Defendant had no duty to install active warning devices at the crossing unless directed to do so pursuant to a program governed by the Federal Railroad Administration is **GRANTED**, under the rule of *CSX Transp., Inc. v. Easterwood,* 113 5. Ct. 1732 (1993).

XV. Defendant's Motion *in Limine* (Doc. No.204) for an order barring Defendant from arguing that Defendant could not have installed active warning devices at the crossing without permission from the Public Utilities Commission of Ohio is **GRANTED**.

XVI. Defendant's Motion *in Limine* (Doc. No.204) for an order barring Defendant from arguing that Defendant satisfied its legal obligations by maintaining a crossbuck at the crossing is **DENIED**. That is a question for the jury.

XVII. Defendant's Motion *in Limine* (Doc. No.205) for an order barring Defendant from presenting evidence

concerning Plaintiff's mention of suicide is **GRANTED**. Such evidence is irrelevant and unfairly prejudicial.

XVIII. Defendant's Motion *in Limine* (Doc. No.206) for an order barring Defendant from presenting evidence concerning Plaintiff's use of marijuana is **GRANTED**. All evidence is that Plaintiff was not under the influence of marijuana at the time of the accident, and evidence as to Plaintiff's marijuana use at other times is irrelevant and unfairly prejudicial.

XIX. Defendant's Motion *in Limine* (Doc. No.207) for cancellation of the scheduled jury view is **DENIED**, in accordance with the agreement of the parties.

IT IS SO ORDERED

DAVID A KATZ
UNITED STATES DISTRICT JUDGE

APPENDIX E

45 U.S.C. §§ 22 and 23 (repealed) E1
45 U.S.C. § 421 (repealed) E1
45 U.S.C. § 431(u) E3
45 U.S.C. § 434 (1992) (repealed) E5
49 U.S.C. §§ 20101, 20102 . . . . . E6
49 U.S.C. § 20106 . . . . . E7
49 U.S.C. § 20143 . . . . . E8
49 U.S.C. § 20301 . . . . . E11
49 U.S.C. § 20302 . . . . . E12

Pages E-1 thru E-15

LOCOMOTIVE BOILER INSPECTION ACT
45 U.S.C. §§ 22 and 23 (repealed)

§ 22 Inspection of locomotives and appurtenances; definitions

When used in this Act, the terms "carrier" and "common carrier" means a common carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the Interstate Commerce Act, as amended, excluding street, suburban, and interurban electric railways unless operated as a part of a general railroad system of transportation. The term "railroad" as used in this Act shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term "employees" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

§ 23 Use of unsafe locomotives and appurtenances unlawful; inspection and tests

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its

boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

FEDERAL RAILROAD SAFETY ACT
45 U.S.C. §§ 421, 431, 434 (1992)
(repealed)

§ 421 Congressional declaration of purpose

The Congress declares that the purpose of this Act is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

§ 431(u) Locomotive conspicuity

(1) The Secretary shall conduct a review of the Department of Transportation's rules with respect to locomotive conspicuity research no later than December 31, 1993. As part of this review, the Secretary shall collect relevant data from operational experience by railroads having enhanced conspicuity measures in service.

(2) Not later than December 31, 1992, the Secretary shall issue interim regulations identifying ditch lights, crossing lights, strobe lights, and oscillating lights as interim locomotive conspicuity

measures, and authorizing and encouraging installation and use of such measures.

(3) Not later than June 30, 1994, the Secretary shall initiate a rulemaking proceeding to issue final regulations requiring substantially enhanced locomotive conspicuity measures. In such rulemaking proceeding, the Secretary shall consider, at a minimum -

(A) revisions to the locomotive headlight standard, including standards for placement and intensity;

(B) requiring use of reflective materials to enhance locomotive conspicuity;

(C) requiring use of additional alerting lights (including ditch, crossing, strobe and oscillating lights).

(D) requiring use of auxilliary lights to enhance locomotive conspicuity when viewed from the side;

(E) the effect of any enhanced conspicuity measures on the vision, health and safety of train crew measures.

(4) The Secretary will issue final regulations requiring enhanced locomotive conspicuity measures no later than June 30, 1995.

§ 434 National uniformity of laws, rules, regulations, orders, and standards relating to railroad safety; State regulation

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

FEDERAL RAILROAD SAFETY AUTHORIZATION ACT
49 U.S.C. §§ 20101, 20102, 20106, 20143

§ 20101. Purpose

The purpose of this chapter [49 USC §§ 20101 et seq.] is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

§ 20102. Definitions

In this part [49 USC §§ 20101 et seq.]-

(1) "railroad"-

(A) means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including-

(i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new

technologies not associated with traditional railroad; but

(B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(2) "railroad carrier" means a person providing railroad transportation.

§ 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue to force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order-

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

§ 20143. Locomotive visibility
(a) Definition.

In this section, "locomotive visibility" means the enhancement of day and night visibility of the front end unit of a train, considering in particular the visibility and perspective of a driver of a motor vehicle at a grade crossing.

(b) Interim regulations. Not later than December 31, 1992, the Secretary of Transportation shall prescribe temporary regulations identifying ditch, crossing, strobe, and oscillating lights as temporary locomotive visibility measures and authorizing and encouraging the installation and use of those lights. Subchapter II of chapter 5 of title 5 [5 USC §§ 551 et seq.] does not apply to a temporary regulation or to an amendment to a temporary regulation.

(c) Review of regulations. The Secretary shall review the Secretary's regulations on locomotive visibility. Not later than December 31, 1993, the Secretary shall complete the current research of the Department of Transportation on locomotive visibility. In conducting the review, the Secretary shall collect relevant information from operational experience by rail carriers using enhanced visibility measures.

(d) Regulatory proceedings. Not later than June 30, 1994, the Secretary shall begin a regulatory proceeding to prescribe final

regulations requiring substantially enhanced locomotive visibility measures. In the proceedings, the Secretary shall consider at least-

(1) revisions to the existing locomotive headlight standards, including standards for placement and intensity;

(2) requiring the use of reflective material to enhance locomotive visibility;

(3) requiring the use of additional alerting lights, including ditch, crossing, strobe, and oscillating lights;

(4) requiring the use of auxiliary lights to enhance locomotive visibility when viewed from the side;

(5) the effect of an enhanced visibility measure on the vision, health, and safety of train crew members; and

(6) separate standards for self-propelled, push-pull, and multi-unit passenger operations without a dedicated head end locomotive.

(e) Final regulations.

(1) Not later than June 30, 1995, the Secretary shall prescribe final

regulations requiring enhanced locomotive visibility measures. The Secretary shall require that not later than December 31, 1997, a locomotive not excluded from the regulations be equipped with temporary visibility measures under subsection (b) of this section or the visibility measures the final regulations require.

(2) In prescribing regulations under paragraph (1) of this subsection, the Secretary may exclude a category of trains or rail operations from a specific visibility requirement if the Secretary decides the exclusion is in the public interest and is consistent with rail safety, including grade-crossing safety.

(3) A locomotive equipped with temporary visibility measures prescribed under subsection (b) of this section when final regulations are prescribed under paragraph (1) of this subsection is seemed to be complying with the final regulations for 4 years after the final regulations are prescribed.

FEDERAL SAFETY APPLIANCE ACT

49 U.S.C. §§ 20301, 20302

§ 20301. Definition and nonapplication
(a) Definition.

In this chapter [49 USC §§ 20301 et seq.], "vehicle" means a car, locomotive, tender, or similar vehicle.

(b) Nonapplication. This chapter [49 USC §§ 20301 et seq.] does not apply to the following:

(1) a train of 4-wheel coal cars.

(2) a train of 8-wheel standard logging cars if the height of each car from the top of the rail to the center of tne coupling is not more than 25 inches.

(3) a locomotive used in hauling a train referred to in clause (2) of this subsection when the locomotive and cars of the train are used only to transport logs.

(4) a car, locomotive, or train used on a street railway.

§ 20302. General requirements
(a) General.

Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines-

(1) a vehicle only if it is equipped with-

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars

required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if-

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

(b) Refusal to receive vehicles not properly equipped. A railroad carrier complying with subsection (a)(5)(A) of this section may refuse to receive from a railroad line of a connecting railroad carrier or a shipper vehicle that is not equipped with power or train brakes that will work and readily interchange with the power or train brakes in

use on the vehicles of the complying railroad carrier.

(c) Combined vehicles loading and hauling long commodities. Notwithstanding subsection (a)(1)(B) of his section, when vehicles are combined to load and haul long commodities, only one of the vehicles must have hand brakes during the loading and hauling.

(d) Authority to change requirements. The Secretary may-

(1) change the number, dimensions, locations, and manner of application prescribed by the Secretary for safety appliances required by subsection (a)(1)(B) and (C) and (2) of this section only for good cause and after providing an opportunity for a full hearing;

(2) amend regulations for installing, inspecting, maintaining, and repairing power and train brakes only for the purpose of achieving safety; and

(3) increase, after an opportunity for a full hearing, the minimum percentage of vehicles in a train that are required by subsection (a)(5)(B) of this section to be equipped and used with power or train brakes.

(e) Services of Association of American Railroads. In carrying out subsection (d)(2) and (3) of this section, the Secretary may use the services of the Association of American Railroads.

Supreme Court, U.S.
FILED
MAR 19 1998
CLERK

No. 97-1364

In The

Supreme Court of the United States

October Term, 1997

ROBERT S. SPRINGSTON,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Plaintiff/petitioner is Robert S. Springston. There are two defendant/respondents: Consolidated Rail Corporation and General Motors Corporation.

Defendant/respondent, Consolidated Rail Corporation, is a wholly-owned subsidiary of Conrail, Inc., which is not a publicly held corporation. Consolidated Rail Corporation has an ownership interest in the following companies: Albany Port Railroad Company; Belt Railroad Company of Chicago; Indiana Harbor Belt Railroad Company; Lakefront Dock and Railroad Terminal Company; Peoria & Pekin Union Railway Company; and TTX Corporation.

Consolidated Rail Corporation does not have an ownership interest in any other company, except for its wholly-owned subsidiaries.

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Mosco v. Baltimore & Ohio Railroad Company, 817 F.2d 1088 (4th Cir. 1987), *cert. denied*, 484 U.S. 851, 108 S.Ct. 152, 98 L.Ed.2d 108 (1987) 4

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STATEMENT OF THE CASE

This petition seeks review of a decision of the Sixth Circuit affirming judgment that was entered on a jury verdict in favor of respondent Consolidated Rail Corporation ("Conrail"). The petition also seeks review of the Sixth Circuit's decision affirming summary judgment for respondent General Motors ("G.M.").

The case arose out of a truck-train accident that occurred just before midnight at a flat and totally unobstructed rural railroad crossing in northwestern Ohio.[1] The single-track crossing had no train-activated warning signals. Springston's eastbound pick-up truck was struck by Conrail's northbound train. Lights and other warning devices on Conrail's locomotive met or exceeded applicable federal regulations.

Petitioner sued Conrail and G.M., the manufacturer of Conrail's locomotive, claiming, among other things, that the locomotive should have been equipped with additional alerting lights. Finding that the Locomotive Boiler Inspection Act, 49 U.S.C. §§ 20701-20903 ("LBIA"), had preempted the field of locomotive equipment regulation, the district court dismissed that claim as to Conrail and granted G.M.'s motion for summary judgment.

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[1] This public crossing is one of 162,426 crossings in the United States, as reported by the Federal Railroad Administration in the 1996 Highway-Rail Crossing Accident/Incident and Inventory Bulletin, No. 19. Springston's statement at p.24 that there are "millions of railroad grade crossings in this country" is inaccurate.

Petitioner proceeded to trial against Conrail only on other negligence claims. A jury verdict was returned in favor of Conrail. On appeal, the jury's verdict and the dismissal of G.M. was affirmed.

The petition challenges the district court's ruling on the allowance of the petitioner's claim that Conrail caused him to collide with Conrail's train, arguing that the district court erred in dismissing the equipment claims against Conrail and G.M.

For the reasons discussed below, there is no cause for this Court's review of the Sixth Circuit decision. Misstatements of fact and law in the petition underscore the obvious lack of meritorious questions for review.

REASONS FOR DENYING THE WRIT

A. The facts of this case do not support reversal.

Springston urges the Court to review the Sixth Circuit decision in the hope that he will gain another trial where he may present his alerting-light claim. The record, however, shows that the outcome of the case would have been the same whether this claim was presented or not.

Springston had no memory of the accident, but the train crew testified that the dome light was on in Springston's cab as it approached the crossing and that he was looking down at the seat beside him. The sheriff's deputy who responded to the collision testified that he found Springston, ejected from his vehicle, lying on top of his road map.

Locomotive alerting lights do provide some additional warning to motorists but that warning is negated for drivers who are reading inside their vehicles. Springston is simply incorrect when he writes in his petition that "This entire tragedy could have been prevented had the locomotive been so equipped." (Brief, p.6.)

In answer to an interrogatory, the jury found that Springston had not observed the signs as he approached the crossing. Skid marks leading to the point of collision indicate that he looked up from his map, became aware of the approaching train, and slammed on his brakes about 50 feet from the crossing. Nothing making Conrail's locomotive more discernible or conspicuous would have prevented this accident. The tragedy could have been prevented only if Springston had observed the railroad-ahead warning signs and then looked and listened for a train.

The question presented in the petition is one that would not affect the outcome. The facts of the case, therefore, do not present an appropriate framework for decision on the issue presented.

B. The law on which the Sixth Circuit based its decision has not been repealed or changed.

The Sixth Circuit held that Springston's alerting-light claim was preempted under the LBIA. Springston argues, in his petition, that the Sixth Circuit erred in holding that his claim was preempted by the LBIA because "The LBIA was repealed on July 5, 1994, more than three years after Springston's collision." (Brief, p.15.) The LBIA was not

repealed. It was recodified at 49 U.S.C. §§ 20701-20903. These sections were omitted from petitioner's appendix.

C. Springston has ignored (or overlooked) the controlling authority from this Court.

Claiming the Circuit Court relied only on the Ninth Circuit's decision in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983), Springston does not cite *Napier v. A.L.C.R. Co.*, 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432 (1926), the case relied upon in Judge Dowd's district court memorandum opinion (App. C14-15, 21-23) and by Judge Batchelder in the opinion below (App. A6-7). *Napier* is dispositive of the question presented for review. Springston presents no compelling reason to disturb this long-standing precedent.[2]

D. The preemptive effect of the LBIA on state regulation of locomotive equipment was not displaced by the Federal Rail Safety Act.

Springston argues that LBIA cannot properly be applied to preempt his alerting-lights claim because the Act was intended only to address safety concerns for

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[2] Other courts have followed the *Napier* decision in holding that the LBIA preempts state authority to regulate locomotive equipment. See *Missouri P. R. Co. v. Railroad Com. of Texas*, 833 F.2d 570 (5th Cir. 1987), *reh'g, en banc, denied*, 845 F.2d 1022 (5th Cir. 1988); *Mosco v. Baltimore & Ohio Railroad Company*, 817 F.2d 1088 (4th Cir. 1987), *cert. denied*, 484 U.S. 851, 108 S.Ct. 152, 98 L.Ed.2d 108 (1987); *King v. Southern Pacific*, 855 F.2d 1485 (10th Cir. 1988); *Eldridge v. Missouri Pacific Railroad*, 832 F.Supp. 328 (E.D. Okla. 1993).

railroad employees and not for the general public. He then concludes that for non-employee claims, the only basis for preemption of state regulation over locomotive equipment is under the express preemption provision of the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 431, recodified at 49 U.S.C. § 20106 (App. E7).

Springston offers no case law to support his argument. The decision of the Sixth Circuit in rejecting his argument is consistent with the ruling in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983). In *Marshall*, Judge (now Justice) Kennedy wrote that the FRSA "does not subsume, replace, or recodify any acts. The logical inference from this structure is that Congress intended to leave unchanged the force and effect of existing federal regulatory statutes."

Moreover, Springston is incorrect in arguing that his alerting-light claim would not be preempted under FRSA. When this accident occurred in June of 1991, the Federal Railroad Administration had already covered the subject of Springston's alerting-light claim. As noted in the *Marshall* opinion, the Federal Railroad Administration ("FRA") had studied and considered regulations on locomotive alerting lights in 1983. The FRA concluded "that the information in the docket does not support the proposition that alerting lights are effective in reducing the incidents of grade-crossing accidents. Without that support, a Federal regulatory requirement that railroads equip their locomotives with an alerting light is not justified." 48 Fed.Reg. 20,257 (May 5, 1983). See *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1154. The explicit decision by the FRA to not require alerting-lights on locomotives preempted state authority to issue such regulations.

In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178, 98 S.Ct. 988, 1004, 55 L.Ed.2d 179 (1978), this Court held that " '[W]here failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such regulation." (quoting *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774, 67 S.Ct. 1026, 1030, 91 L.Ed. 1234 (1947)). See also *Norfolk & W. R. Co. v. Public Utilities Com.*, 926 F.2d 567 (6th Cir. 1991), *reh'g, en banc, denied*, 1991 U.S. App. Lexis 7104 (6th Cir. Apr. 12, 1991) (holding that the FRA's explicit refusal to adopt a regulation requiring railroad bridge walkways was a determination that such a regulation was not appropriate, and thus amounted to negative preemption of an Ohio regulation requiring such walkways). Although the FRA did later issue regulations requiring alerting lights, its determination in 1983 that alerting-light regulations were not appropriate was still effective as preempting Springston's claim.[3]

At the time of Springston's accident, the FRA had not only studied the issue of alerting lights but had also issued regulations specifying the type and intensity of locomotive lights. In 49 C.F.R. § 229.125 (promulgated in

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[3] Springston is incorrect in stating that the FRA alerting-light regulations were promulgated after the district court and Sixth Circuit rulings in this case. (Brief, p.18.) The FRA issued an Interim Rule on alerting lights on February 3, 1993 (IR-1) (58 Fed.Reg. 6899), which was revised on May 13, 1994 (59 Fed.Reg. 24963). A final rule was issued on March 6, 1996 (61 Fed.Reg. 8887). The regulation was codified at 49 C.F.R. 229.133.

1980), the FRA required that lead locomotives be equipped with headlights that produce "at least 200,000 candela," and that the headlights "be arranged to illuminate a person at least 800 feet ahead and in front of the headlight." That regulation covered the subject of Springston's claim of common-law negligence for failure to equip the locomotive with a different type of headlight, and effected preemption under the FRSA. Thus, even though the decision below was not based on a finding of preemption under the FRSA, Springston's conclusion that a different result would have followed under that analysis is wrong.

E. There is no genuine conflict between the Sixth Circuit decision and the decisions of the Montana Supreme Court.

Springston urges the Court to grant his petition for the purpose of resolving a conflict between the decision of the Sixth Circuit and the law of Montana. He cites two decisions of the Montana Supreme Court: *Runkle v. Burlington Northern R.R. Co.*, 188 Mont. 286, 613 P.2d 982 (Mont. 1980) and *Henry v. District Court of the Seventeenth Judicial District*, 198 Mont. 8, 645 P.2d 1350 (1982). Although those cases did involve alerting-light claims, the decisions did not address the issue of preemption under the LBIA, which was the basis for the Sixth Circuit ruling.

In *Runkle v. Burlington Northern*, 613 P.2d 991, the court held that the issue of a railroad's negligence in "failing to provide . . . oscillating headlights . . . is a question of fact for the jury." The court, however, did not

address whether Congress had occupied the field of locomotive equipment through the LBIA. Likewise, in *Henry v. District Court*, 645 P.2d 1352, the court held that a jury could decide whether the railroad "had a common-law duty to equip its locomotive with various warning devices." Although the court acknowledged the railroad's argument that the alerting-light claim was preempted under the LBIA,[4] the court did not address that argument. Instead, the court considered only whether there was preemption under the FRSA based on a federal regulation covering alerting lights. The court concluded that the FRA had not issued an alerting-light regulation and, on that basis alone, held that the alerting-light claim was not preempted, stating "this Court does not believe that there is a federal preemption question involved in this case. . . . " *Henry v. District Court*, 645 P.2d 1353.

Since the Montana court did not address the issue of preemption under the LBIA, the decisions cited by Springston are not in genuine conflict with the Sixth Circuit ruling. While the holdings of the Montana cases in allowing alerting-light claims does conflict with the Sixth Circuit decision that those claims are preempted under LBIA, those holdings may be viewed simply as unfortunate products of incomplete analysis. Had the Montana court addressed the issue of LBIA preemption and concluded that the claims were not so preempted, a genuine conflict might exist. That is not the case, and Springston's argument that the court should grant his petition to resolve this claimed conflict is unavailing.

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[4] *Henry v. District Court*, 645 P.2d 1351.

F. The decision of the Sixth Circuit serves the interest of national uniformity over locomotive equipment regulation.

The Court should deny Springston's petition because the Sixth Circuit decision supports the objective of national uniformity in railroad regulation. One court addressed the potential dangers from non-uniform locomotive regulation in *Consolidated Rail Corp. v. Pennsylvania Public Utilities Comm'n*, 536 F.Supp. 653 (E.D.Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd sum. sub nom., Pennsylvania Public Utilities Comm'n v. Consolidated Rail Corp.*, 461 U.S. 912, 103 S.Ct. 1888, 77 L.Ed.2d 280 (1983). In *Consolidated Rail*, the court wrote that if state authority were to reach the subject of locomotive equipment, the exercise of that authority could generate "a new reservoir of differing, and possibly incompatible, railroad safety law. This would run counter to Congress's purpose of uniform regulation [as stated in 49 U.S.C. § 20106]." The district court noted its concern over this danger in the case *sub judice*, writing that "If each state is permitted to make its own decisions with respect to such items as reflective materials, oscillating, strobe and ditch lights, such goal [the Congressional goal of national uniformity on locomotive-equipment regulation] would be compromised." (App. C23.)

The scope of potential conflicts between regulations of various states regarding locomotive equipment would be significant if the Court were to adopt Springston's proposal and abandon preemption under the LBIA. In fact, the complaint that Springston filed illustrates the point. While his petition addresses only the issue of preemption as it relates to his alerting-light claim, that claim

was only one of many he alleged about the locomotive. He also claimed that the locomotive should have been equipped with reflective material, that it should have been painted a different color, and that the train horn was not loud enough. (App. C7.) Without uniformity on the requirements for locomotive design and equipment, railroads could face widely different demands for locomotives traveling from state to state on a virtually limitless range of features.

G. This case does not present an important federal question for review.

Springston's petition urges the Court to grant certiorari to decide whether his alerting-light claim was properly dismissed on the basis of LBIA preemption. He concedes, however, that the claim would be preempted under the FRSA if brought today, since he acknowledges that the FRA has promulgated regulations covering the subject of locomotive alerting lights. (Brief, pp.17, 18.) Any decision by the Court on the effect of LBIA preemption on alerting-light claims, therefore, would be of interest solely to the parties in this case.

CONCLUSION

For the foregoing reasons, respondent, Consolidated Rail Corporation, respectfully urges the Court to deny the petition.

Respectfully submitted,

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Supreme Court, U.S.
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MAR 23 1998
CLERK

No. 97-1364

In The

Supreme Court of the United States

October Term, 1997

ROBERT S. SPRINGSTON,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION

and

GENERAL MOTORS CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT GENERAL MOTORS CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTERESTED PARTIES

The petitioner is Robert S. Springston, the plaintiff in the district court and the appellant before the court of appeals. The respondents are Consolidated Rail Corporation and General Motors Corporation, defendants in the district court and appellees before the court of appeals.

Pursuant to Supreme Court Rule 29.6, respondent General Motors Corporation states that it does not have a parent company. Its nonwholly owned subsidiaries are as follows:

Asset Leasing GmbH
Carus Grundstucks-Vermietungsgesellschaft mbH & Co.
General Motors GmbH & Co. OHG
Opel-Automobilwerk Eisenach-PKW Gmbh
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Contro Toonico Herramental, S.A. de C.V.
Packard Electric Hebi Co., Limited
Packard Electric Bai Cheng Co., Limited
Delphi Italia Automotive Systems S.r.l.
Delphi Italia Service Center S.r.l.
DRB s.a./n.v.
Opel France S.A.
ENCI S.A.R.L.
Texton P.L.C.
Delphi Harrison
Delphi L'EM Argentina S.A.
Reinshagen Tournai S.A.
GM Ovonic L.L.C.
Banque Opel
General Acceptance (Thailand) Ltd.
Holden National Leasing Limited
GM Finance HB

STATEMENT OF INTERESTED PARTIES – Continued

OPEL Leasinggesellschaft mbH
Polbank, S.A.
P.T. GMAC Lippo Finance
General Motors de Argentina S.A.
Beijing Wanyuan GM Automotive Electronic Control Co., Ltd.
Hubei Delphi Automotive Generator Co., Ltd.
Saginaw Norinco Lingyun Drive Shaft Co., Ltd.
Zhejiang Delphi Asia-Pacific Brake Co. Ltd.
General Motors Colmotores, S.A.
IBC Vehicles Limited
Millbrook Pension Management Ltd.
DIRECTTV Enterprises, Inc.
IBC Vehicles (Distribution) Limited
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
PanAmSat Corporation
PT General Motors Buana Indonesia
P.T. Packard Kabelindo Murni Indonesia
Radiodores Richard, S.A.

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Display of Alerting Lights by Locomotives at Public Rail-Highway Crossings, 47 Fed. Reg. 44791 (Oct. 12, 1982) 19, 22, 23

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STATEMENT OF THE CASE

Just before midnight, petitioner Robert Springston drove across railroad tracks in rural Ohio. He was looking at a map on the seat next to him, not at the tracks, and a train was coming. The locomotive's 200,000-candela headlight beam was intense enough to illuminate a person nearly three football fields away. The engineer sounded its 96-decibel horn. Petitioner did not notice the train, and sustained serious injuries when it struck his pickup.

The locomotive complied with all federal regulations specifying the nature and performance of devices to warn of the train's approach – the headlight, horn, and bell. However, petitioner claims that under Ohio law General Motors (which designed and built the locomotive) and Conrail (which operated it) were negligent in not installing additional warning – so-called "conspicuity" – equipment such as oscillating lights.

GM moved for summary judgment, and Conrail for partial summary judgment, on the grounds that the claim concerning locomotive equipment was preempted by both (1) the Locomotive Boiler Inspection Act ("BIA"), 49 U.S.C. §§ 20301-20306, 20701-20903, which under *Napier v. Atlantic Coast Line Railroad*, 272 U.S. 605 (1926), preempts the field of locomotive design, construction and equipment; and (2) the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §§ 20101-20144, which under *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), preempts state requirements (including common-law requirements) when a federal standard "cover[s] the subject matter of the State requirement."

The district court granted the motion. It held that *Napier* was dispositive and BIA thus preempted petitioner's claim. (Pet. App. C 13-24)[1] The Court of Appeals for the Sixth Circuit affirmed, also holding that BIA preempted the claim under *Napier*. (App. A 4-9) Having found *Napier* and BIA dispositive, neither the district court nor the Sixth Circuit reached the issue of preemption by FRSA. The court denied petitioner's petition for rehearing and suggestion for rehearing en banc. (App. B)

SUMMARY OF ARGUMENT

There is no issue to review. For 70 years this Court has held that BIA occupies the field and preempts all state law respecting "the design, the construction and the material of every part of the locomotive and of all appurtenances." *Napier v. Atlantic Coast R.R.*, 272 U.S. 605, 611 (1926). Thus *Napier* and a long line of lower court cases have held that BIA preempts all state law within the scope of the Federal Railroad Administration's ("FRA's") authority – that is, all state law respecting locomotive design and equipment. Petitioner's claim here – directed

[1] It also granted summary judgment to Conrail on petitioner's punitive damages claim, which is not at issue here. (*See* App. A 9-10) The case proceeded to trial against Conrail on a claim of inadequate warning devices at the crossing. The jury apportioned 70% negligence to petitioner and 30% to Conrail. (App. A 4) The judgment against Conrail was affirmed below and the adequacy of the warning at the crossing is not at issue here.

at locomotive design features – falls squarely in the occupied field, and so, the Court of Appeals held, is preempted under *Napier*. The petition does not cite, much less challenge, *Napier* or its controlling force here.

Petitioner imagines a conflict on the issue, but there is none. Petitioner cites no case that questions BIA field preemption or *Napier*, or that holds that conspicuity-equipment claims are outside the preempted field defined by *Napier*. A lone Montana decision declined, 16 years ago, to find preemption of a conspicuity-equipment claim, but it overlooked *Napier* altogether. No other decision has followed it on the point since. An old case, decided without consideration of this Court's controlling precedent, which has never been followed, does not warrant review of a settled issue. As to petitioner's other "conflicting" cases, they do not address BIA preemption at all, much less *Napier* or conspicuity equipment claims.

Even if there were not field preemption under BIA and *Napier*, the decision below still would be correct, for FRSA provides an alternative ground requiring preemption. The Court recently held in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), that FRSA expressly preempts state law (including state common law) relating to railroad safety where there is a federal regulation "covering the subject matter of the State requirement." 49 U.S.C. § 20106. Here, carefully considered FRA regulations cover locomotive lights and horns, and so cover the subjects of – and therefore, under FRSA and *CSX*, preempt – petitioner's claims.

Finally, even if there were some question about the law, there is no reason to address it here. Conspicuity-

equipment claims arise rarely, and so there is no conflict with respect to them. Moreover, this case is a uniquely poor vehicle to address any conspicuity-equipment issue: since the case was decided, new conspicuity-equipment regulations have gone into force, making any disposition here essentially irrelevant to future cases.

The decision below was correct, in fact compelled by settled Supreme Court precedent. There is no significant conflict. The petition should be denied.

REASONS FOR DENYING THE PETITION

I. THE LAW HAS BEEN SETTLED FOR 70 YEARS THAT BIA PREEMPTS CLAIMS LIKE THESE.

In 1926, Justice Brandeis wrote in *Napier* that BIA grants the federal government exclusive authority over "the design, the construction and the material of every part of the locomotive and of all appurtenances," including "equipment." *Napier v. Atlantic Coast R.R.*, 272 U.S 605, 611-612 (1926). BIA, *Napier* expressly held, "was intended to occupy the field" and precluded all state law within the matters committed to the ICC. 272 U.S. at 613. *Napier* has been repeatedly followed. *See Southern Ry. v. Lunsford*, 297 U.S. 398, 402 (1936) ("whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within" the BIA's scope); pp. 5-13, below. In fact, the Court affirmed in 1983 a decision finding preemption by BIA and FRSA. *Consolidated Rail Corp. v. Penn. Pub. Util.*

Comm'n, 461 U.S. 912 (1983) (mem.), *aff'g* 696 F.2d 981 (3d Cir. 1982), *aff'g* 536 F. Supp. 653, 655 (E.D. Pa. 1982) (BIA "preempts state regulation of locomotive equipment").[2]

The Court of Appeals did nothing wrong or radical here; it simply applied *Napier* according to its terms, and barred common-law claims that would impose under Ohio law requirements respecting locomotive designs or equipment to increase conspicuity. Petitioner does not even cite *Napier*, although it was the foundation of the Court of Appeals' decision. And petitioner does not urge that *Napier* should be overruled. Thus, there is nothing to review.

A. *Napier*'s Rule: BIA Preempts All State Law Respecting Locomotive Design Or Equipment, Including Conspicuity Equipment.

Article VI of the Constitution provides that federal law "shall be the supreme Law of the Land: . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Federal law preempts state law where federal law occupies the field, state law conflicts with federal law, or federal law expressly preempts state law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). "The states must leave all regulatory activity" in an occupied field "to the Federal Government." *Michigan Canners & Freezers Assoc. v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984).

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[2] The only question decided by the lower court in that case was preemption. This Court's summary affirmance has precedential force. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

"When the United States has exercised its exclusive powers over interstate commerce [to occupy the field], the States no more can supplement its requirements than they can annul them." *Penn. R.R. v. Pub. Serv. Comm'n*, 250 U.S. 566, 569 (1919) (state law requiring caboose pre-empted where federal law silent on subject).

Railroads have been "subject to comprehensive federal regulation for nearly a century." *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 687 (1982). National regulation of railroad safety, particularly locomotive safety, stretches back at least to 1893. In that year, Congress enacted the first of a series of laws known as the Safety Appliance Acts and BIA,[3] now codified at 49 U.S.C. §§ 20301-20306; 20701-20903 (1994).[4] BIA regulates

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[3] The Safety Appliance Acts were: Mar. 2, 1893, c.196, 27 Stat. 531 (currently codified in parts of 49 U.S.C. §§ 20301, 20302, 20304, 21302, 21304); Mar. 2, 1903, c. 976, 32 Stat. 943 (see 49 U.S.C. §§ 20301, 20302, 20303, 20304, 21302); and April 14, 1910, c. 160, 36 Stat. 298 (see 49 U.S.C. §§ 501, 20102, 20302, 20303, 21302, 21304).

The Boiler Inspection Acts were: Feb. 17, 1911, c. 103, 36 Stat. 913 (currently codified in parts of 49 U.S.C. §§ 20102, 20701, 20702, 20703, 21302, 21304); Mar. 4, 1915, c. 169, 38 Stat. 1192 (see 49 U.S.C. §§ 20701, 20702, 20703, 21302); June 26, 1918, c. 105, 40 Stat. 616 (repealed); June 7, 1924, c. 355, 43 Stat. 659 (see 49 U.S.C. §§ 20102, 20701); and April 22, 1940, c. 124, 54 Stat. 148 (see 49 U.S.C. §§ 20701, 20702, 20703, 21302).

[4] Congress recently recodified all "laws related to transportation in one comprehensive title" resulting in certain minor changes in language to promote clarity and consistency. H.R. Rep. No. 103-108 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 820. However, "[i]n making changes in the language, precautions have been taken against making substantive changes in the law." *Id. See* Revision of Title 49, Transportation,

the condition, safety and testing of every "locomotive or tender and its parts and appurtenances." 49 U.S.C. § 20701.

Uniformity of locomotive regulation is essential. As the Court stated in *Baltimore & Ohio R.R. v. Groeger*, 266 U.S. 521 (1925), supplemental locomotive equipment claims cannot be left to the "varying and uncertain opinions and verdicts of juries":

> There is a multitude of mechanical questions involved in determining the proper construction, maintenance and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. ***It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine renders and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries.***

Id. at 529-30 (citations omitted) (emphasis added). Indeed, state and local locomotive requirements would require train changes at state or even county lines, which would paralyze the railroad industry:

United States Code, Pub. L. 103-272, §§ 1(a), 6(a), 108 Stat. 745, 1378 (1994) (act restated existing law "without substantive change").

> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined.

Law v. General Motors Corp., 114 F.3d 908, 910-11 (9th Cir. 1997).

Accordingly, BIA grants the Interstate Commerce Commission authority over "the design, the construction and the material of every part of the locomotive and of all appurtenances," including "equipment." *Napier*, 272 U.S at 611-12.[5] BIA "was intended to occupy the field," and preempts all state law within the matters committed to the ICC (and today, the FRA). 272 U.S. at 606, 613.

That is true regardless whether the state law conflicts with any federal rule, whether there is any applicable federal rule at all, and whether the state law has the same or a different purpose as BIA:

> ***It is also urged that, even if the Commission has power to prescribe*** an automatic firebox door and a cab curtain, ***it has not done so; and that it has made no other requirement inconsistent***

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[5] In 1966, the power originally granted to the ICC was transferred to the Secretary of Transportation. Department of Transportation Act, Pub. L. 89-670, 80 Stat. 931 (1966). The FRA, a division of the Department of Transportation, exercises the power. 49 C.F.R. § 1.49(c)(5), (g).

> ***with the state legislation. This, if true, is without legal significance.*** The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to ***occupy the field***. . . . [R]equirements by the States are precluded, however commendable ***or however different their purpose***.

272 U.S. at 613 (emphasis added). In sum, "if the protection now afforded by the Commission's [now FRA's] rules is deemed inadequate, application for relief must be made to it." *Id.*

Petitioner does not question *Napier*, and it remains established law. *See Consolidated Rail Corp. v. Penn. Pub. Util. Comm'n*, 461 U.S. 912 (1983) (mem.), *aff'g* 696 F.2d 981 (3d Cir. 1982), *aff'g* 536 F. Supp. 653, 655 (E.D. Pa. 1982) (summarily affirming decision that BIA and FRSA preempted state law requiring speed recorders and indicators; BIA "preempts state regulation of locomotive equipment"). The lower courts have accordingly applied it to preclude state by state regulation of locomotive equipment, just as Congress intended. *See, e.g., Law v. General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997) (BIA preempts negligent-design claim for failure to include equipment on locomotives; "Congress intended federal law to occupy the field of locomotive equipment and safety"); *Missouri Pacific R.R. v. R.R. Comm'n*, 833 F.2d 570, 576 n.7 (5th Cir. 1987) (BIA preempts state law requiring telemetry devices on locomotives; "State attempts to prescribe *any* locomotive safety equipment

must necessarily fail") (emphasis in original), *cert. denied*, 488 U.S. 1009 (1989); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1151-52 (9th Cir. 1983) (Kennedy, J.).[6]

Petitioner suggests that Congress repealed BIA. (Pet. 15) Not so. To the contrary, Congress re-enacted and recodified BIA in 1994, and moved it from Title 45 to Title 49 of the United States Code. (P. 6, n.4 above) Congress' recodification of BIA, without substantive change (*id.*), after the long line of decisions finding field preemption, affirms that Congress' preemptive intent was properly gauged by *Napier* and its progeny. *See Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) (re-enactment of statute implicitly adopts settled judicial construction); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (same).

Napier and progeny dictate that BIA preempts petitioner's claim. The preempted field under *Napier* – "the design, the construction and the material of every part of the locomotive and of all appurtenances," including locomotive "equipment," 272 U.S at 611-12 – includes design features and equipment respecting conspicuity. Indeed, regulations under BIA show that the FRA has authority

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[6] Federal district courts and state intermediate appellate courts agree that BIA preempts state law respecting locomotive equipment. *E.g., Burlington Northern R.R. v. State of Montana*, 805 F. Supp. 1522, 1529 (D. Mont. 1992) ("Telemetry devices are unquestionably within the Secretary's power to regulate. . . . Therefore, any state regulation of such devices is absolutely preempted"); *Missouri Pacific R.R. v. R.R. Comm'n of Texas*, 671 F. Supp. 466 (W.D. Tex. 1987) (radios); *CXST, Inc. v. Pitz*, 699 F. Supp. 127, 129 (W.D. Mich. 1988) (commodes); *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (Ind. App. 1996) (unspecified common-law design-defect claim).

over the subject of petitioner's complaint, and has exercised it; FRA regulations specifically govern visual and audible warning devices. *See* 49 C.F.R. § 229.125 (headlamp and, effective December 1997, auxiliary warning devices); 49 C.F.R. § 229.133 (transitional regulation of auxiliary warning lights); 49 C.F.R. § 229.129 (audible warning device); pp. 18-19, below.

Established law thus dictated the result the Sixth Circuit reached in this conspicuity-equipment case, and a long line of authority agrees. *Marshall,* 720 F.2d at 1151-52 (BIA preempts a claim alleging need for same conspicuity equipment allegedly needed here); *Eldridge v. Missouri Pacific R.R.,* 832 F. Supp. 328, 330 (E.D. Okla. 1993) (BIA preempts "state law with respect to allegations concerning the adequacy of the locomotive warning devices"); *Smith v. Norfolk & W. Ry.,* 776 F. Supp. 1335, 1342-43 (N.D. Ind. 1991) (FRSA "preempts the claim that the train's headlight was inadequate"); *Central R.R. of Georgia v. Markert,* 410 S.E.2d 437, 438 (Ga. App. 1991) (BIA preempts claim that "failure to have equipped the locomotive with certain safety and warning devices was actionable negligence"); *Carter v. Consolidated Rail Corp.,* 1998 Ohio App. Lexis 514 (Feb. 10, 1998) (same).

Petitioner proposes that BIA was meant only to protect railroad employees, and theorizes that bystanders' claims thus are not preempted. (Pet. 15) That thesis is wrong, from premise to conclusion, and no court has adopted it. As to the premise, Congress intended BIA to protect both employees and the traveling public. BIA was formally entitled "An Act to Promote the Safety of Employees and Travelers Upon Railroads. . . . " 36 Stat. 913 (1911); *see* S. Rep. No. 68-740, at 1-2 (1924) ("The

locomotive boiler inspection law was enacted in 1911 for the purpose of protecting the safety of employees and travelers upon railroads. . . . ").

As to the conclusion, *Napier* itself rejected the argument that state law survives preemption if its purpose differs from the federal statute's. Indeed, one of the state regulations there challenged served the same purpose that petitioner would have Ohio law effect here: "to protect travelers upon the highways crossed by the railroad at grade." 272 U.S. at 609-10. The states in *Napier* argued primarily that BIA preempted only laws with the same purpose as the federal statute:

> The argument mainly urged by the States in support of the claim that Congress has not occupied the entire field, is that the federal and state laws are aimed at distinct and different evils; that the federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it.

Napier, 272 U.S. at 612. The Court found the purpose of the state regulation irrelevant. The dispositive point was that "[t]he federal and state statutes are directed to the same subject – the equipment of locomotives. They operate upon the same object." *Id.* If states require additional or non-uniform locomotive safety equipment for any reason, interstate commerce is impaired in the same way.

This case proves the point. Petitioner's bystander claim would, if allowed, impose state equipment requirements on locomotives which FRA rejected, and which come within the authority of the Secretary of Transportation, not states, to prescribe. Accordingly, that claim would affect the "physical elements" of locomotive equipment, and so "would operate upon the same object" – locomotive equipment – as it would if brought by railroad employees. *Napier*, 272 U.S. at 612. Therefore, it would likewise result in a patchwork of state regulation – the opposite of the uniform regulation Congress intended. Consequently, it is likewise preempted, and without exception, every reported case on point so holds. *Marshall*, 720 F.2d at 1152 (relying on *Napier* to find bystander tort suit preempted by BIA); *Eldridge*, 832 F. Supp. at 330 (same); *Markert*, 410 S.E.2d at 438 (same); *Carter*, 1998 Ohio App. Lexis 514 (same). Indeed, this Court has expressly held bystander claims preempted by FRSA. *CSX*, 507 U.S. at 673-76.

Napier is good law, and it applies here squarely. There is nothing to review.

B. There Is No Conflict With Respect To *Napier*'s Application Here.

Petitioner conjures a conflict between the Court of Appeals' decision and a decision from the early 1980s that rejected preemption of a conspicuity-equipment claim. *See Henry v. District Court*, 645 P.2d 1350 (Mont. 1982), *appeal dismissed*, 457 U.S. 1101 (1982) (cited in Pet. 12). But *Henry* did not cite, much less address, *Napier* and

its finding of BIA field preemption.[7] A decision that does not analyze the controlling Act, overlooks the controlling Supreme Court precedent, and has never been followed on the point by any reported decision since,[8] is hardly a source of conflict or trouble. Indeed, petitioner did not even cite *Henry* below.

Petitioner then tallies up five other decisions supposedly showing states' resistance to preemption on other subjects. In truth, none of those cases is even relevant, much less in conflict with the decision below. For example, *Runkle v. Burlington Northern, Inc.*, 613 P.2d 982 (Mont. 1980) (cited in Pet. 11), focuses on the adequacy under state law of warning signs and gates at grade crossings, and on train speed. But those are matters outside BIA's field; BIA's field is locomotive equipment, not grade crossings or train speed. Indeed, the grade-crossing issues in this case were not held preempted, but went to

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[7] Plaintiff in *Henry* alleged that a railroad was negligent under state law in not equipping its locomotive with an oscillating headlight and strobe light. 645 P.2d at 1350. Although the defendant argued preemption by both FRSA and BIA, the court discussed preemption only under FRSA and did not discuss BIA, much less cite *Napier*. 645 P.2d at 1351, 1352. This Court lacked jurisdiction to correct the error. *Burlington Northern, Inc. v. Henry*, 457 U.S. 1101 (1982) (dismissing appeal).

[8] One district court has cited *Henry* in holding that FRSA preempts only when there is a federal regulation on point. *Edwards v. Consolidated Rail Corp.*, 567 F. Supp. 1087, 1101 (D.D.C. 1983), *aff'd*, 773 F.2d 966 (D.C. Cir.), *cert. denied*, 469 U.S. 883 (1984). That is true under FRSA. *CSX*, 507 U.S. at 664-65. BIA, by contrast, occupies the field and was not at issue in *Edwards*.

the jury.[9] *Runkle* briefly discusses the railroad's state-law duties concerning locomotive conspicuity, but never mentions federal preemption, BIA, or *Napier*.

Two other cases address solely state substantive law and have nothing to do with BIA or preemption. *Hogue v. Southern Pacific Co.*, 460 P.2d 965 (Cal. 1969); *DeElena v. Southern Pacific Co.*, 592 P.2d 759, 762 (Ariz. 1979) (cited in Pet. 19-20). Like *Runkle*, *Hogue* concerned state law standards for grade crossings, not locomotives; therefore had nothing to do with BIA; moreover predated FRSA and *CSX;* and did not address preemption at all. *DeElena* likewise concerned state law standards of care, and said nothing about BIA or preemption or federal law.

Petitioner's last two cases, *Rucker v. Norfolk & Western Railway*, 381 N.E.2d 715 (Ill. App. 1978), *rev'd*, 396 N.E.2d 534 (Ill. 1979), and *In re Miamisburg Train Derailment Litigation*, 626 N.E.2d 85 (Ohio), *cert. denied*, 513 U.S. 809 (1994), are likewise off point. Both concerned exploding tank cars, not locomotives. Not surprisingly, neither mentioned, much less addressed, the issues here: BIA and its preemption of the field of locomotive design and equipment, including locomotive conspicuity equipment. *Rucker* also is dead wrong. Both the Illinois Court of Appeals and Illinois Supreme Court held in *Rucker* that FRSA does not preempt state tort requirements more stringent than federal regulations. 381 N.E.2d at 722-23; *Rucker v. Norfolk & W. Ry.*, 396 N.E.2d 534, 537 (Ill. 1979). That is the proposition for which petitioner cites it. (Pet.

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[9] In any event, this Court has since laid down the preemption rules as to claims concerning grade crossings. *CSX*, 507 U.S. at 673-75.

21-22). This Court has since held the contrary. *CSX*, 507 U.S. at 673-75 (FRSA preempts state tort law, including tort law that would impose duties more stringent than federal regulations). Pp. 14-15, below. As for *Miamisburg*, it held that FRSA did not preempt a particular claim where there was no federal regulation covering the subject matter. 626 N.E.2d at 95. That is way off point, since (1) the issue under *Napier* and BIA is field preemption; and (2) as to FRSA preemption, here we have federal regulations that cover visual and audible warning devices.[10] (Pp. 16-23, below)

To end where we began, *Napier* holds that BIA preempts all state law concerning locomotive design and equipment. The Sixth Circuit simply followed *Napier*. Petitioner cites no case from any court that questions *Napier*'s controlling force over claims like petitioner's, or its dictate of preemption. There is nothing to review.

II. THE ALTERNATIVE GROUND: FRSA PREEMPTION.

The Court of Appeals found that BIA preempted petitioner's claim. It thus had no occasion to address the other basis for preemption – FRSA. This Court has recently addressed FRSA preemption, in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993). *CSX* would compel a finding of preemption even if *Napier* did not.

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[10] Indeed, the Ohio Court of Appeals agrees that *Miamisburg* is off point and that BIA preempts locomotive conspicuity-equipment claims. *See Carter v. Consolidated Rail Corp.*, 1998 Ohio App. Lexis 514 (Feb. 10, 1998).

Thus, even if the Court were to review the decision, overrule *Napier* after 70 years of precedent, and so reverse the decision below, the Sixth Circuit on remand would have to address – and find – preemption by FRSA. Thus, review of BIA preemption decision here would not resolve the case or allow it to go to trial in any event.

A. FRSA's Express Preemption Of Common-Law Claims Where An FRA Regulation Is In Effect On The Same Subject Matter.

In 1970, Congress enacted FRSA, 49 U.S.C. §§ 20101-20144 (1994). FRSA is not limited to locomotives, but authorizes the Secretary of Transportation (through FRA) to issue regulations in the area of railroad safety generally. FRSA reiterates Congress' determination that railroad safety be regulated nationally: "[l]aws, regulations, and orders related to railroad safety shall be *nationally uniform* to the extent practicable." 49 U.S.C. § 20106 (emphasis added).

FRSA accordingly expressly preempts every state "law, regulation, or order," including "legal duties imposed . . . by the common law," relating to railroad safety where a federal regulation "cover[s] the subject matter of the State requirement." 49 U.S.C. § 20106; *CSX*, 507 U.S. at 664. A federal regulation thus preempts state law if it "substantially subsumes" the subject matter regulated. *CSX*, 507 U.S. at 664.

B. The FRA Regulations For Audible And Visual Warning Equipment At The Time Of Petitioner's Accident.

Even before petitioner's accident, the FRA specified what audible warning equipment and lights locomotives must carry. Equipment on the lead locomotive must "produce[ ] a minimum sound level of 96 db(A)." 49 C.F.R. § 229.129(a). This intensity must be achieved at "100 feet forward of the locomotive in its direction of travel." 49 C.F.R. § 229.129(a). The performance must be measured using a meter conforming to the ANSI Sl.4-1971, Type 2, set to an A-weighted slow response. 49 C.F.R. § 229.129(b). At the time of the test, the locomotive must be on level tangent track and the microphone must be exactly 4 feet above the ground and centered on the track. 49 C.F.R. § 229.129(b). Measurement tolerance is ±4 db(A). 49 C.F.R. § 229.129(c).

The FRA likewise specified, at the time of petitioner's accident, the kind and intensity of locomotive visual warning equipment. The lead locomotive must carry headlights that produce "at least 200,000 candela." 49 C.F.R. § 229.125(a). There must be two lights, one facing front and one rear, if the locomotive is regularly run backwards. 49 C.F.R. § 229.125(a). The lights must have a dimming device. 49 C.F.R. § 229.125(c). The lights must be arranged to "illuminate a person at least 800 feet ahead". 49 C.F.R. § 229.125(a).[11]

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[11] For years before petitioner's accident, the FRA considered and rejected additional lighting devices as unnecessary or counterproductive. *See* Proposed Requirement for Display of Alerting Lights by Locomotives at Public Grade

Affidavits of Conrail's general foreman of locomotives and its locomotive inspector established without dispute that the locomotive here, inspected just ten days before petitioner's accident, complied with the FRA regulations on audible warning and light equipment.

C. The FRA Regulations Preempt Petitioner's Proposed Common Law Requirements For Audible Warning And Light Equipment.

CSX teaches that once the FRA has decided the appropriate safety measures for a particular hazard, it has covered the subject. No state can require additional

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Crossings, 44 Fed. Reg. 34982 (June 18, 1979); Proposed Requirement for Display of Alerting Lights by Locomotives at Public Grade Crossings, 47 Fed. Reg. 16189 (Apr. 15, 1982) (proposed rules received extensive criticism and the agency withdrew them); Display of Alerting Lights by Locomotives at Public Rail-Highway Crossings, 47 Fed. Reg. 44791, 44795 (Oct. 12, 1982); Display of Alerting Lights by Locomotives at Public Rail-Highway Crossings; Termination of Rulemaking, 48 Fed. Reg. 20257, 20258 (May 5, 1983) (FRA terminated previous rulemaking because "Substantial questions [had been] raised about the effectiveness of the strobe light (and alerting lights generally), the costs involved, and the operational reliability of the strobe devices"; FRA then initiated new rulemaking, determined that auxiliary lights ought not be required, and terminated the second rulemaking. "There is no evidence that alerting lights are effective in reducing grade crossing accidents"; "[T]he group of equipped railroads . . . had a slightly *higher* grade-crossing accident rate. . . . [A]lerting lights have no discernible effect on the incidence of grade crossing accidents.") (emphasis added).

or different measures to address that same hazard, whether by statute, regulation or common-law claims that would impose state requirements. In *CSX*, for example, petitioner sought to impose a common-law duty to operate a train at a lower speed than the federal speed limit set by the FRA. The Court rejected the argument that states could impose stricter limitations than the federal speed limit. It held that states cannot supplement federal regulations or reweigh risks that the Federal Railroad Administration has already taken into account:

> On their face, the provisions of § 213.9(a) address only the maximum speeds at which trains are permitted to travel. . . . Nevertheless, related safety regulations adopted by the Secretary reveal that ***the limits were adopted only after the hazards posed by track conditions were taken into account.*** Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also ***precluding additional state regulation*** of the sort which respondent seeks to impose on petitioner. . . . ¶ [T]he limits in § 213.9(a) were set with safety concerns already in mind. . . . ¶ Read against this background, § 213.9(a) should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings.

507 U.S. at 674-75 (emphasis added).

In *CSX*, the federal regulations also specified the type of warning device to be installed at a grade crossing, and the method by which the device was to be selected. This Court held that a claim based on inadequacy of the warning device would accordingly be preempted. "[T]he

Secretary has determined the devices to be installed. . . ." 507 U.S. at 671. The regulations "therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and repair dangerous crossings." *Id.*[12] Thus, under *CSX*, where the FRA has specified the devices to be installed, the states may not impose additional regulations.

CSX controls this case. As in *CSX*, federal regulations cover the subject here. The complaint alleges that the locomotive was defective under Ohio law because it did not "adequately audibly or visually warn[ ]" of the train's approach. (Complaint ¶¶ 22, 48) But federal regulations specify the exact audible and visual warning equipment required on locomotives, including the equipment's power, performance and orientation. Pp. 18-19, above. The regulations are directed at precisely the same purpose as petitioner's tort claim: ensuring that people outside the locomotive, and in particular motorists at grade crossings, will know a train is coming.

Horns are there to warn bystanders of an approaching train. So are headlights. The FRA's rulemaking has made clear that headlights are conspicuity devices, and that FRA determines whether additional lights also are required. For example, the FRA's 1979 notice of proposed

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[12] The particular plaintiff's claim in *CSX* was not preempted because federal funding of the intersection project, a prerequisite to application of the particular regulation at issue, was not present. *Id.* at 671-73. There is no such funding prerequisite in the FRA regulations about lights and audible warnings.

rulemaking for auxiliary warning lights listed three existing conspicuity devices: headlights, whistles and bells. Proposed Requirement for Display of Alerting Lights by Locomotives at Public Grade Crossings, 44 Fed. Reg. 34982, 34983 (June 18, 1979). The agency's 1982 proposal to require alerting lights reiterated that "current FRA regulations require a headlight that produces at least 200,000 candela for each lead locomotive [and an audible warning device]. *These devices provide significant audible and visual alerting characteristics.*" The proposed rule thus described auxiliary warning lights as a "complement" to the headlight. Display of Alerting Lights by Locomotives at Public Rail-Highway Crossings, 47 Fed. Reg. 44791, 44792 (Oct. 12, 1982) (emphasis added).[13]

In fact, at 200,000 candela, 49 C.F.R. § 229.125(a), the headlight is as bright as or brighter than *all* of the auxiliary warning lights that the FRA considered and rejected

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[13] Likewise, the agency's first advance notice of proposed rulemaking for auxiliary warning lights stated that oscillating lights might be used "to provide an *increased degree of visual conspicuity over and above that of a stationary white headlight* for vehicular traffic at grade crossings; it *supplements the standard fixed beam headlight*. . . . " Strobe Lights on Locomotives, 43 Fed. Reg. 9324, 9325 (March 7, 1978) (emphasis added). And the 1997 requirement to carry warning headlights is part of the headlight regulation; the FRA obviously considers warning lights and headlights the same "subject matter." *Cf. Consolidated Rail Corp. v. Penn. Pub. Util. Comm'n*, 536 F. Supp. 653, 657-58 (E.D. Pa. 1982) (by discussing related devices together in advance notice of proposed rulemaking, FRA indicated they were part of same subject matter for preemption purposes), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (mem.). *See also* 49 U.S.C. § 20143(d)(1) (FRA to review "locomotive headlight standards" as part of effort to improve locomotive conspicuity).

before petitioner's accident, or that it required beginning in 1997. *See, e.g.*, "Display of Alerting Lights by Locomotives at Public Rail-Highway Crossings", 47 Fed. Reg. 44791, 44795 (October 12, 1982) (proposing auxiliary lights between 400 and 200,000 candela); 49 C.F.R. § 229.125(d)(2) (newly required auxiliary headlights to be at least 200,000 candela); pp. 18-23, nn.11 and 13 above. A beam powerful enough to illuminate a person 800 feet away, 49 C.F.R. § 229.125(a), can be seen from farther away still.

In short, headlights and horns warn that a train is coming, and so are conspicuity devices as a matter of law and common sense. Petitioner's claim is expressly preempted, because the FRA regulations "cover[ ] the subject of the state requirement." Put another way, petitioner's claim fails because the railroad "complied as a matter of law with its duty to provide locomotive warning devices when it met the requirements of 49 C.F.R. §§ 229.125 [headlight], 229.129 [horn]. . . . " *Marshall*, 720 F.2d at 1153; *see also Eldridge*, 832 F. Supp. at 330 (citing *Marshall*); *Smith*, 776 F. Supp. at 1342-43; *Markert*, 410 S.E.2d at 438 (quoting *Marshall*). There are no contrary cases since *CSX*.

D. The Exception To FRSA Preemption Does Not Apply

Congress provided a narrow set of circumstances in which FRSA would not preempt state regulations on a subject covered by federal regulations. To avoid preemption, state laws or regulations must (1) be "necessary to eliminate or reduce an essentially local safety hazard;" (2) not be "incompatible" with federal law or regulations;

and (3) "not unreasonably burden interstate commerce." 49 U.S.C. § 20106. Petitioner's claim must pass all three tests, but fails all three.

As to test (1), locomotive conspicuity is not an "essentially local" safety concern. Visibility of trains approaching grade-crossings is not a matter unique to Ohio, much less to the crossing where petitioner was injured. Moreover, the state doctrines on which petitioner relies – negligence, strict liability and warranty (Complaint at 3-13) – do not deal with local hazards; like the negligence claim preempted in *CSX*, they provide "general rule[s] to address all hazards caused by lack of due care, not just those owing to unique local conditions." *CSX*, 507 U.S. at 675. Holding general state rules to be directed at local hazards "would completely deprive the Secretary of the power to pre-empt state common law, a power clearly conferred by § 434 [now § 20106]." *Id.; see* H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4117 (local hazards are not "Statewide in character"). Locomotive visibility can be and is dealt with through uniform national standards with respect to conspicuity devices. *See Union Pacific R.R. v Pub. Util. Comm'n*, 723 F. Supp. 526, 530 (D. Ore. 1989) (essentially local safety hazard must be "not statewide in character," and "not capable of being adequately encompassed in uniform national standards").

As to test (2), petitioner not only seeks to impose different duties upon defendants from those imposed by BIA and FRSA, they seek to impose rules on defendants that the FRA had rejected at the time of petitioner's accident. Thus petitioner's proposed rules are contrary to federal law, and so incompatible with it.

As to test (3), Congress intended that locomotive safety equipment standards be uniform and consistent. For, as Judge Friendly observed, permitting different state standards would have a "paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them." *Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D.N.Y. 1964), *aff'd*, 364 F.2d 241 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967). Claims such as petitioner's could require a train to be designed one way to go into one state, and another way to go into another. That would obviously put extreme burdens on interstate commerce, and present the archetypal case federal law was meant to preempt.

In sum, the preemption decision below is right, not only under *Napier* and BIA, but also under *CSX* and FRSA. There is no reason to review it.

III. THE QUESTION PRESENTED ARISES RARELY AND IS NOT IMPORTANT.

The Court has addressed both BIA and FRSA preemption, in the case of FRSA just a few years ago. There is no need to revisit either issue, especially since the preemption issue arises rarely. BIA preemption has come up infrequently in the 70 years since *Napier*, and has engendered no controversy when it has. And *CSX* laid the FRSA matter to rest; few cases since *CSX* even address the issue. Conspicuity-equipment preemption cases are particularly rare; the parties cite only seven cases, including the decision below, that have addressed preemption of such claims, and those decisions (putting

aside the Montana case that overlooks *Napier*) are unanimous.

Recent regulatory developments also dictate that, as a practical matter, a decision in this case will not inform future cases. If there were any doubt that federal regulations could or did cover the subject of locomotive conspicuity equipment – and so preempted claims addressed to that issue – the FRA dispelled it in 1996. It ruled that effective December 31, 1997, locomotives must carry two 200,000-candela auxiliary lights, arranged in a specified manner to form a triangle with the headlight. 49 C.F.R. § 229.125(d) The obvious purpose is to provide for conspicuity.

That decision, issued after years of examining the costs and benefits of conspicuity devices,[14] expressly takes into account the hazard of low visibility and attempts to avert it, and so covers the subject matter. *CSX*, 507 U.S. at 673-75. Thus, even if this case, which arose before the 1996 regulations took effect, somehow should have avoided BIA or FRSA preemption, a decision here would have no effect on future conspicuity-equipment cases. Those cases would have to be decided with reference to the new regulations. The new regulations also dispose of the (imaginary) specter, raised in the petition, of rampant railroad accidents if review is denied. (Pet. 24-25) The new FRA regulations do away with any urgency, if there ever were any to begin with.

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[14] *See* pp. 18-23 and nn. 11 and 13 above.

Finally, petitioner prevailed against Conrail below on a theory that the crossing (as opposed to the locomotive) did not have adequate conspicuity devices. (App. A 4) His damages and his own comparative fault (paying no attention and reading a map on the railroad tracks) are the same regardless of what conspicuity theory he pursues. Thus, even if the partial summary judgment as to an alternative liability theory were in error, the petitioner has little to complain about. In that setting, review would seem unnecessary, even if there were somehow an issue to review.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED: March 23, 1998.

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In The
Supreme Court of the United States
October Term, 1997

ROBERT S. SPRINGSTON
Petitioner,

v.

CONSOLIDATED RAIL CORPORATION, et al.;
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY BRIEF

I. Introduction

Neither Conrail nor GM present any compelling basis to deny Springston's Petition. This Court is therefore urged to grant Springston's Petition and address the issue of whether state law tort claims for

lack of locomotive conspicuity devices are preempted.

II. **Argument**

First, and most interesting, both Conrail and GM concede that the Sixth Circuit's decision in this case conflicts with the decisions of at least one state court of last resort, namely Henry v. District Court of the Seventeenth Judicial District, 198 Mont. 8, 645 P. 2d 1350 (1982), and Runkle v. Burlington Northern R.R. Co., 188 Mont. 286, 613 P.2d 982 (1980). For example, at page 8 of its Brief, Conrail admits

> the holdings of the Montana cases in allowing alerting-light claims does [sic] conflict with the Sixth Circuit decision that those claims are preempted under LBIA . . ..

Likewise, GM concedes that the Montana Supreme Court "declined, 16 years ago, to find preemption of a conspicuity-equipment

claim".[1] (GM Brf. at 3) What GM tacitly admits is that Runkle and Henry are in conflict with the Sixth Circuit's decision in this case.

It has been demonstrated, then, that the Sixth Circuit's decision in this case is in direct conflict with one or more decisions of a state court of last resort. Hence, Springston has satisfied Rule 10(a) of Rules of the Supreme Court of the United States. Accordingly, the Court is urged to grant Springston's Petition for Writ of Certiorari.

Secondly, Conrail and GM's reliance on Napier v. Atlantic A.C.L.R. Co., 272 U.S. 605 (1926) is wholly misplaced. Napier is a decision based solely upon the LBIA. As shown previously, the LBIA has no connection or relevance to locomotive conspicuity

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[1]It is somewhat curious that GM would highlight the fact that the Montana Supreme Court decision is 16 years old, when GM has tethered its entire argument to the Napier decision, a 72-year-old decision.

issues. It is not, contrary to Conrail and GM's protestations, dispositive of any issue in this case. Locomotive conspicuity devices such as ditch lights, strobe lights, and oscillating lights were not in existence in the United States when the LBIA was drafted. These devices could not have even been considered by this Court in Napier. Consequently, Napier and its progeny are not pertinent to the issue before this Court, since Napier and its progeny are focused on railroad employee safety, not the safety of motorists approaching grade crossings. It comes as no surprise, then, that the Supreme Court of Montana did not address the LBIA and Napier when it held that state law tort claims for lack of conspicuity devices are not preempted, since Napier and the LBIA have no relevance to locomotive conspicuity issues.

Springston's state law tort claims are not affected by the LBIA or Napier. Instead,

Springston's claims are governed by the Federal Railroad Safety Authorization Act, 49 U.S.C. §§ 20101 et seq, and its predecessor, the Federal Railroad Safety Act, 45 U.S.C. §§ 421 et seq. Not only were these Acts the first to address locomotive conspicuity, they were the first to define it. Locomotive conspicuity entails

> the enhancement of day and night visibility of the front end unit of a train, considering in particular the visibility and perspective of a motor vehicle at a grade crossing. 49 U.S.C. § 20143(a).

This definition squarely addresses the issue before this Court. The LBIA and Napier have no such definition, and do not address anything close to this specific subject matter. Therefore, it is beyond dispute that the controlling authority for this issue is set forth in the FRSAA and FRSA. Under the

FRSAA and the FRSA, state law tort claims are not preempted unless and until the Secretary of Transportation has issued final rules on the use of ditch lights, strobe lights, and oscillating lights for locomotives. 49 U.S.C. § 20106; 45 U.S.C. § 434. Here again, Conrail concedes that final rules concerning the use of locomotive conspicuity devices were not issued by the Secretary until after Springston's collision, and after Judge Dowd awarded summary judgment on his claims concerning conspicuity devices. To reiterate, the collision occurred on June 2, 1991. Judge Dowd awarded summary judgment on July 5, 1994. Conrail admits on page 6 of its Brief, footnote 3, that no final rule, of any kind, was issued until March 6, 1996, being codified at 49 C.F.R. 229.133. It is clear that the rule making to which Conrail refers occurred years after the collision and award of summary judgment. Even then, Conrail incorrectly refers to 49 C.F.R.

229.133 as a final rule. The very title of 49 C.F.R. 229.133, "Interim Locomotive Conspicuity Measures - Auxiliary External Lights," contradicts Conrail's statement. Interim measures do not constitute final rule making. Conrail cites no legislation more recent than 49 C.F.R. 229.133. Thus, there has been no final rule making issued on this subject. Accordingly, the Sixth Circuit's decision in this case, rendered November 19, 1997, came at a time when the Secretary still had not issued final rule making concerning locomotive conspicuity devices. It must be concluded, then, that Springston's state law tort claims are not preempted by the FRSAA or FRSA.

GM, for its part, does not even address the relevant legislation concerning locomotive conspicuity. Instead, GM misses the mark by discussing regulations concerning headlight intensity for a locomotive, a matter wholly distinct from locomotive

conspicuity devices. Headlight intensity regulations do not appear in 49 C.F.R. 229.133, which deals with locomotive conspicuity. The reason is obvious - locomotive headlights do not enhance its visibility to a motorist approaching a crossing. Instead, a locomotive headlight enhances the train crew's ability to detect hazards ahead of it like washed out rail lines or track obstructions, but does not enhance the locomotive's conspicuity to a motorist approaching a grade crossing. This point was not lost on the Montana Supreme Court, which held

> "Congress has preempted the area of illumination devices, but not warning devices." Henry, 198 Mont. at 13, 645 P.2d at 1352.

The locomotive headlight, with all its candela, is an illumination device. It is not a warning device, nor was it ever intended to be. As such, GM's argument

concerning the locomotive headlight regulations in 49 C.F.R. 229.125(a) is completely inapposite to the issue before this Court.

III. Conclusion

Springston has demonstrated that the decision of the Sixth Circuit in this case is in conflict with the decision of a state court of last resort. Conrail and GM have not presented any compelling argument to the contrary. Accordingly, Springston respectfully asks this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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